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ORIGINAL

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION

IES
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DECEMBER 1982
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DECISIONS

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DECEMBER

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 8, 1982

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket Nos. PENN 80-174-R
: PENN 81-179(A)
v. :
:
KOCHER COAL COMPANY :

DECISION

This case on interlocutory review involves a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). On March 1, 1977, a fatal inundation occurred at Kocher Coal Company's Porter Tunnel Mine. On February 20, 1980, after the Mine Safety and Health Administration (MSHA) completed its accident investigation, seven citations and orders were issued to the operator. A notice of contest of the citations and orders was filed. Order No. 0611706, the sole order presently at issue, alleged that the operator failed to drill boreholes required by 30 C.F.R. § 75.1701.

On July 17, 1981, the Secretary filed a request for settlement approval with the administrative law judge. Among other things, the Secretary sought vacation of Order No. 0611706. The judge denied the settlement motion on the basis of insufficient supporting information, and scheduled a hearing on the proposed settlement motion. At the hearing, counsel for both parties described the conditions leading to the citations and orders. Regarding the order at issue here, counsel for the Secretary stated that the MSHA inspector who had viewed the area concerned and the Solicitor did not believe Kocher violated section 75.1701 by failing to drill the required boreholes. He also stated, however, that the MSHA district manager who had issued the order still believed a violation occurred.

On October 19, 1981, the Secretary filed a petition for penalty assessment for all seven citations and orders. In the petition, the Secretary reaffirmed his previous request for settlement approval, including the requested vacation of Order No. 0611706.

On October 26, 1981, the administrative law judge issued an order approving settlement of six of the citations and orders. The judge disapproved, however, the Secretary's request to vacate the order concerning the boreholes and ordered the Secretary to produce the district manager at an evidentiary hearing. Subsequently, the operator filed a motion for judgment on the pleadings and a motion to withdraw its notice of contest. The Secretary supported these motions, restating his position that no violation of section 75.1701 had occurred. The judge denied the operator's motions stating that because he would not grant the Secretary's motion to vacate the order, there were no grounds for Kocher's motions. The judge certified the case to the Commission for interlocutory review. In his certification, he observed that his "conclusion is not free from doubt." The Commission granted interlocutory review.

The threshold question before us is whether the requested action pertaining to the subject order is appropriately treated as a motion for settlement approval or a motion to vacate the order. We conclude that the latter treatment is necessary. Although the request for vacation of the order was initially contained in a settlement motion, it is clear that in substance it was a request to vacate the order. Further, the subsequent pleadings filed by the parties clearly demonstrate that they seek vacation of the order rather than settlement. Also, Commission precedent requires that this type of request not be treated as a settlement. In *Co-op Mining Co.*, 2 FMSHRC 3475 (December 1980), we reversed a judge's approval of a proposed settlement because the record established that no violation occurred. *See also Amax Lead Company of Missouri*, 4 FMSHRC 975 (June 1982). In the present case, the Secretary has stated clearly that he does not believe a violation occurred. The operator concurs. Thus, there can be no settlement; the Secretary's request must be treated as a motion to vacate the order.

The remaining issue is whether the judge erred in refusing to grant the Secretary's motion to vacate the order and in requiring the district manager's attendance at an evidentiary hearing. Preliminarily, we hasten to dispel any lingering notions on the part of the Secretary that the Commission and its judges are without authority to review the request made in this case. When a notice of contest is filed, Commission jurisdiction attaches. 30 U.S.C. § 815(d). Therafter, any affirmance, vacation, or modification of the subject citation or order is accomplished only upon order of the Commission. *Id.*; *Climax Molybdenum Co.*, 2 FMSHRC 2748 (October 1980), *pet. for rev. filed*, No. 80-2187, 10th Cir. (Nov. 6, 1980).

The Secretary's original request for settlement approval cited the testimony of an MSHA inspector, at an MSHA public hearing, that the operator had complied with the borehole regulation:

> Order No. 00611706 was vacated, since MSHA Inspector Charles Klinger testified at the public hearing that he had gone up to the old Weaver slope and observed the hole into it. He further testified that from his observations, the Respondent was complying with 30 C.F.R. § 75.1701 at that location (Tr. 770, 772). It should be noted that the No. 15 breast was more than 200 feet from the Bush slope where the inundation water came from. Thus, boreholes were not required from the No. 15 breast relative to the Bush slope. The only abandoned working within 200 feet was the Weaver slope, which had been cut into

> and drained. In view of Inspector Klinger's testimony, MSHA does not feel that a violation could be established. [1/]

Further, the Secretary's petition for penalty assessment stated:

> The Solicitor's Office does not believe that the violation of 75.1701 ... existed. Therefore, the Solicitor's Office with the approval of MSHA has determined that it will not prosecute this violation.

(Emphasis added). We assume from this statement that the Solicitor conferred with MSHA before deciding not to prosecute the violation. The operator agrees with the Secretary's determination not to prosecute. 2/ In light of the reasons given by the Secretary on the record in support of the request to vacate the order, we hold that in these unique circumstances the judge erred in not granting the motion.

We are cognizant of and fully appreciate the reasons behind the judge's action. Counsel for the Secretary informed the judge that the district manager who issued the order still believed that a violation occurred. We note that conflicts among the opinions of various Secretarial personnel are not unprecedented occurrences. It is not clear from the record why the Secretary chose to air this particular dispute on the public record. Nevertheless, it is the responsibility of the Secretary to resolve his internal conflicts and he ultimately has done so in this case.

We conclude that, insofar as our review of the action officially requested by the Secretary is concerned, i.e., vacation of the involved order, adequate reasons to support his request have been stated on the record.

1/ Shortly after the inundation, the Mining Enforcement and Safety Administration (MSHA's predecessor) convened a public hearing on the causes of the inundation. The inspector testified at this hearing. We note that Kocher's brief in support of the motion for settlement request also relies on Inspector Klinger's testimony at the public hearing. Kocher further states that "[N]o reason is advanced why the accuracy or credibility of this inspector should now be brought into question. No conflicting testimony was elicited." Brief at 5.

2/ The parties' agreement distinguishes this case from *Climax Molybdenum Co.*, *supra*, where the operator objected to the Secretary's attempted unilateral vacation of the citations therein at issue.

Accordingly, we grant the Secretary's motion to vacate Order No. 0611706 and dismiss this case.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson

A. E. Lawson, Commissioner

L. Clair Nelson

L. Clair Nelson, Commissioner

Distribution

Mark N. Savit, Esq.
Cotten, Day & Doyle
1899 L Street, NW
Suite 1200
Washington, D.C. 20036

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 5TH FLOOR
WASHINGTON, D.C. 20006

December 9, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. BARB 76-153
v.	:	
ALABAMA BY-PRODUCTS CORPORATION	:	IBMA 76-114

DECISION

This case arose under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976)(amended 1977)("the Coal Act"). 1/ Alabama By-Products Corporation and the Secretary filed cross-appeals with the Department of Interior's Board of Mine Operations Appeals from a decision of an administrative law judge affirming in part and vacating in part a notice of violation alleging a violation of 30 C.F.R. § 75.1725(a). 2/ The cited standard provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

For the reasons that follow we modify the judge's decision and find a violation of the cited standard based on the totality of the circumstances at issue.

The notice described the alleged violation of 30 C.F.R. § 75.1725(a) as follows:

> The no. 1 belt conveyor ... was not being maintained in safe operating condition in that there were 13 defective bottom rollers also the conveyor belt was cutting into numerous bottom belt structures. The no. 1 belt conveyor ... was removed from service.

1/ In this case, review was sought of an abated notice of violation. For the reasons stated in our decision in Eastern Associated Coal Corp., 4 FMSHRC 835 (May 1982), we will review the merits of the notice at this time. For this reason, we need not address the arguments of the parties concerning whether the judge correctly concluded that the notice at issue could be reviewed because it was tantamount to a withdrawal order.

2/ On March 8, 1978, this case was pending on appeal before the Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration.

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The conditions were cited and corrected and the citation terminated on that same day. The issues before the Commission are: whether the cited standard is enforceable; whether the judge correctly interpreted the duties imposed by the standard; whether the judge's findings of fact concerning the conditions of the stuck rollers and belt are supported by the evidence; and whether the judge erred by holding that the notice was valid despite the inspector's failure to follow an internal MESA memorandum concerning the enforcement of section 1725.

On appeal, as it did before the judge, Alabama challenges the validity of 30 C.F.R. § 75.1725 on two grounds. First, it argues that the standard is so ambiguously drafted and applied that it is invalid under the Coal Act. Second, it argues that the standard is unconstitutionally vague. The judge found that he lacked authority to entertain statutory or constitutional challenges to the validity of standards and therefore declined to pass upon Alabama's arguments. The Commission has held "that a challenge to the validity of a standard adopted under the 1969 Coal Act can be raised and decided in an adjudication before the Commission." Sewell Coal Co., 3 FMSHRC 1402, 1405 (June 1981). The Commission has also held that it has the power to determine the constitutionality of the provisions of the mine safety statute itself. Kenny Richardson, 3 FMSHRC 8, 17-21 (January 1981), aff'd on other grounds, 689 F.2d 632 (6th Cir. 1982). In light of these conclusions, and for similar reasons, we conclude that the Commission has the authority to decide the challenges to the validity of the standard raised in this case.

We first address the argument that the standard is unconstitutionally vague. Alabama argues that 30 C.F.R. § 75.1725 "offers no definite standard of conduct possible of ascertainment with certainty or clarity" and that it "fails to give fair notice of the nature of possible violations." The cited standard requires that machinery or equipment be maintained in "safe operating condition" and that such machinery immediately be removed from service if it is in an "unsafe condition." In order to pass constitutional muster, a statute or standard adopted thereunder cannot be "so incomplete, vague, indefinite or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connolly v. Gerald Constr. Co., 269 U.S. 385, 391 (1926). Rather, "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 109, 108-109 (1972).

Therefore, under 30 C.F.R. § 75.1725(a) in deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. See, e.g., Voegele Co., Inc. v. OSHRC, 625 F.2d 1075 (3d Cir. 1980). Through application of this test to the facts of a particular case, due process problems stemming from an operator's asserted lack of notice are avoided. Thus, we reject Alabama's argument that 30 C.F.R. § 75.1725(a) is unconstitutionally

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vague on its face. As discussed further *infra*, applying the above standard to the facts presented in the case before us, we find no merit in the operator's contention that it lacked fair notice of the nature of the violation with which it was charged.

We likewise reject the argument that the standard is so ambiguous and overbroad that it is void under the statute. Broadness is not always a fatal defect in a safety and health standard. Many standards must be "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp*., 3 FMSHRC 2496, 2497 (November 1981). *See Ryder Truck Lines, Inc*. v. *Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). We conclude that the operator has not established that the Secretary exceeded his rulemaking authority under the Coal Act in adopting the general standard at issue requiring that machinery and equipment be maintained in "safe" condition.

The next issue is whether the judge correctly interpreted the duties imposed by 30 C.F.R. § 75.1725(a). The judge held the standard imposes three separate duties: (1) a duty to maintain the equipment in safe operating condition; (2) a duty to remove unsafe equipment immediately; and (3) a duty to repair the equipment if the operator intends to continue to use the equipment. In *Peabody Coal Co*., 1 FMSHRC 1494 (October 1979), we construed an identical standard, 30 C.F.R. § 77.404(a), as having two requirements. We stated:

> The regulation imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation.

1 FMSHRC at 1495. We now hold that the terms of the cited standard do not impose a duty requiring that unsafe machinery or equipment removed from service be repaired before abatement is accomplished. Rather, once unsafe equipment is removed from service abatement is completed. If such equipment is returned to service without repair, an additional, separate violation of the standard would occur. Accordingly, we hold the judge erred by imposing a separate duty to repair the equipment as a condition precedent to abatement.

We now turn to an examination of the judge's findings concerning whether a violation occurred. The notice of violation issued by the inspector stated that the "belt conveyor ... was not being maintained in safe operating condition in that there were 13 defective bottom rollers also the conveyer belt was cutting into numerous bottom belt structures." The judge found a violation based upon the latter condition, but not the former. In our view, in the circumstances of this case, the judge erred in treating the situation described as constituting discrete violative conditions. Rather, based upon the wording of the notice of violation and our review of the entire record, including the inspector's testimony at the hearing, we conclude that the allegation of the unsafe condition in this case was based on the combination of the frozen rollers and the belt running out of train cutting into belt support structures. 3/

We further conclude that the conditions described in the record establish a violation of 30 C.F.R. § 75.1725. The operator does not dispute that the 13 bottom rollers were frozen and that the belt running out of train was cutting into numerous belt structures. Thus, the central issue is whether an unsafe condition existed. The inspector testified that a belt running over a frozen roller will produce friction, leading to a heat source. He also believed that coal residue on the belts could rub on and accumulate around a frozen roller. He further testified that friction and heat would be caused by the belt cutting into the belt structures. The judge found, and we agree, that the belt running out of train could cause coal to fall off and accumulate. The inspector's testimony regarding the friction sources and attendant heat build-up was not effectively rebutted by the operator.

We conclude that a reasonably prudent person familiar with the factual circumstances surrounding the hazardous condition alleged here, including any facts peculiar to the mining industry, would recognize that the cited equipment was in an unsafe condition. The danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious. Where such dangers are present due to defects in the operating condition of equipment, that equipment cannot be considered in safe operating condition. In light of the nature of the danger, the evidence relied upon by the operator concerning other conditions in the area, i.e., that the belt was wet and fire-resistant, the area was adequately rock-dusted and ventilated, and coal accumulations were not then present, is not controlling as to whether an unsafe condition existed. Rather, these factors are appropriately considered in determining the "gravity" of the violation when a penalty is assessed. 30 U.S.C. § 820(i). As the Tenth Circuit has observed in a decision upholding a violation of the identical standard at issue here: "It is clear that Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing." Mid Continent Coal & Coke Co. v. FMSHRC, No. 792271, 10th Cir., Sept. 24, 1981; 2 BNA MSHC 1450. In the present case, upon observing the defective equipment at issue, it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action.

The final issue in this case involves an internal MESA memorandum concerning the enforcement of 30 C.F.R. § 75.1725. That memorandum stated:

3/ Both parties agree with this view of the case. In its brief to us, the operator states that the "belt allegedly running out of train was simply a condition which resulted from the frozen rollers." Br. at 15. The operator further states that "[t]here was no evidence ... that the frozen rollers caused the belt to run out of train simply because it was obvious that this had occurred." Br. at 14 n. 15. Similarly, in its brief MSHA states that "the condition of the thirteen defective belt rollers, coupled with the belt running out of train and cutting into numerous belt structures, is unsafe according to a proper construction of 30 C.F.R. § 75.1725." Br. at 16 (emphasis added).

> ... When an operator is made aware that equipment or machinery is in an unsafe operating condition, by any person, the action of the operator immediately following notification determines whether or not a violation occurs. *If the faulty equipment is immediately removed, there is no violation. If the operator continues to use the faulty equipment, he is in violation.* 4/ (Emphasis added.)

The operator notes that the Secretary acknowledges that the directive was not followed in the present case. Had the memorandum been followed, the notice of violation would not have been issued since the operator immediately removed the belt conveyor from service.

We agree with the judge's holding that the memorandum's interpretation of the standard is contrary to the plain language of the standard. We hold that the legal effect of the memorandum is similar to that of the Secretary's enforcement manuals discussed in *King Knob Coal Co.*, 3 FMSHRC 1417 (1981):

> Regarding the Manual's general legal status, we have previously indicated that the Manual's "instructions are not officially promulgated and do not prescribe rules of law binding upon [this Commission]." *Old Ben Coal Company*, 2 FMSHRC 2806, 2809 (1980). In general, the express language of a statute or regulation "unquestionably controls" over material like a field manual. *See* *H.B. Zachry* v. *OSHRC*, 638 F.2d 812, 817 (5th Cir. 1981).... This does not mean that the Manual's specific contents can never be accorded significance in appropriate situations. Cases may arise where the Manual *or a similar MSHA document* reflects a genuine interpretation *or* general statement of policy whose soundness commends deference and therefore results in our according it legal effect. This case, however, does not present that situation.

3 FMSHRC at 1420 (emphasis added). Accordingly, we accord no legal effect to the memorandum and affirm the judge's holding that the failure to follow it does not invalidate the notice.

4/ Internal agency directive from John Crawford, then Assistant Administrator for the Coal Mine Health and Safety Division of MESA (July 14, 1975).

For the foregoing reasons, the judge's decision is modified and the notice alleging a violation of 30 C.F.R. § 75.1725(a) is affirmed.

Rosemary M. Collyer
Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

L. Clair Nelson
L. Clair Nelson, Commissioner

Distribution

J. Fred McDuff, Esq.
Fournier J. Gale, Esq.
Alabama By-Products Corporation
P.O. Box 10246
Birmingham, Alabama 35202

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge George Koutras
Fed. Mine Safety & Health Rev. Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 15, 1982

JOSEPH W. HERMAN :
:
v. : Docket No. WEST 81-109-DM
:
IMCO SERVICES :

DECISION

This case arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980). In his decision below, the administrative law judge held that the discrimination complaint giving rise to this proceeding was not timely filed and, therefore, he dismissed the complaint. 4 FMSHRC 1540 (August 1982)(ALJ). The judge proceeded, however, to discuss and make further findings concerning the merits of the complaint. For the reasons that follow, we affirm the dismissal. Accordingly, we find it unnecessary to consider or address the question of whether a violation of section 105(c) occurred.

Complainant Joseph W. Herman was employed as a senior project engineer at IMCO Services's Mountain Springs Plant near Battle Mountain, Nevada. Herman's duties encompassed field engineering and supervision of the construction of facilities at the Mountain Springs Plant to increase the production of barite. 1/ In the period of March-April 1979, work on the expansion project had progressed to the stage where a barite storage bin was to be erected. Based on his experience and information available to him, Herman believed that a serious safety problem existed due to the design of the bin and its intended use. To put it simply, Herman believed that the weight of the bin itself, the weight of the amount of barite that could be stored in the bin, and the relevant stress factors to which the structure would be

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1/ From the record it appears that IMCO's operations involved three interrelated stages and facilities. Barite ore was extracted from an open pit mine, subjected to a process to up-grade the ore, and then further processed through a grinding operation. There is no dispute that the facility at which Herman worked falls within the coverage of the Mine Act. As an employee working at this facility, Herman was a "miner" within the meaning of the Act. 30 U.S.C. § 802(g).

subjected, would prove too great a load for the bin's designed support system, resulting in a collapse of the entire structure. 2/

The evidence also indicates that, at the time that the expansion project had progressed to the barite bin erection stage, IMCO was concerned with cost-overruns and budget constraints. In any event, on or about April 9, 1979, Herman and his superior in Houston, Texas communicated by telephone. Whatever else was said in this conversation, it is at least clear that Herman was advised that his phase of the project was to be halted and that he and others involved would be terminated. 3/

On April 11, 1979, representatives of MSHA visited the site, at the request of Herman, to discuss the storage bin project. Other company personnel attended this meeting. 4/ As a result of this meeting, a report was prepared by MSHA's Denver Technical Support Center concerning the bin design. This report concluded that on the basis of available information the storage bin should be redesigned. The report, however, was not issued until after Herman had been terminated.

Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), in pertinent part provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a ... mine, or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise of such miner ... of any statutory right afforded by this Act.

2/ The record reveals that Mr. Herman's concerns were well-founded. Each of IMCO's witnesses testified that they became aware of the problem with the bin design. Although memories were vague as to exactly how each of the witnesses became aware of the problem, it is clear that the problems were known to these company personnel while Herman was still employed by IMCO.

3/ When Herman's termination actually became effective is unclear. He continued working to phase out construction until April 13, 1979. He may have been carried on the payroll until April 20th.

4/ Precisely when company personnel who did not attend the meeting learned that the meeting was to occur, or had occurred, is disputed. In any event, shortly thereafter it was common knowledge that MSHA became involved at Herman's request.

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), further provides:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination. ****

At the hearing, after Mr. Herman had completed presentation of his case-in-chief, counsel for IMCO made a motion to dismiss Herman's complaint on the basis that it was not timely filed under section 105(c)(2). Herman made a statement in opposition and testified against the motion. The administrative law judge took the motion under advisement and IMCO proceeded with its case. In his final decision the judge addressed the timeliness issue and concluded that Herman's complaint should be dismissed. We agree.

Section 105(c)(2) of the Mine Act quoted previously, requires that complaints of discrimination under the Act be filed "within 60 days after such violation occurs" (emphasis added). The legislative history relevant to this filing provision states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)("Legis. Hist.")(emphasis added).

The events that form the basis of Herman's complaint of discrimination occurred in April 1979. However, the first action that Herman took relative to filing any complaint concerning those events did not occur until March 3, 1980. 5/ Thus, the discrimination complaint in

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5/ On this date Herman apparently mailed a letter to the Nevada Employment Security Department. Although this letter is not in evidence, a March 11, 1980, letter from the Nevada Department of Occupational Safety and Health to Herman, informing him that his inquiry had been referred to it, is of record. In this letter,

(Footnote continued)

this case was filed 11 months after the incidents complained of had occurred, and 9 months after the expiration of the time period specified in the statute regarding the filing of such complaints.

We conclude that the record does not reveal "justifiable circumstances" for this extraordinary delay. Legis. Hist. at 624. In essence, Mr. Herman's testimony and statements of record indicate that he did not file any complaint before March 1980 simply because he did not want to do so. He had been more concerned with the safety of the bin than with his discharge. However, after mulling his situation over for some time (during which time he allegedly discussed his situation with various unidentified safety officials), and after he "kind of took a walk in the park one night" (Tr. 152), he concluded that he had been wronged and that he desired to be vindicated. Consequently, in March 1980, Herman finally took his first official step by complaining to the Nevada Employment Security Department.

We conclude on the basis of the entire record that Herman's prolonged hesitation in filing a discrimination complaint cannot be attributed to his being misled as to or a misunderstanding of his rights under the Act. Rather, the record reveals that he had direct contact with MSHA officials during the period that the events now complained of occurred, as well as after his termination. Quite simply, he had abundant opportunity and the ability to go forward with his complaint in a more timely fashion, if he had then desired to do so. Although the record reveals confusion on Herman's part concerning the procedure for processing his complaint once it had been filed, these misunderstandings are not relevant to the reasons for his delay in filing a complaint and, hence, they do not excuse the late-filing.

The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:

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fn. 5/ continued
Nevada OSHA forwarded an employee complaint form to Herman. Herman subsequently filed a completed complaint with Nevada OSHA, dated April 4, 1980. By letter dated April 29, 1980, Herman was informed that this complaint had been referred to the U.S. Department of Labor's Mine Safety and Health Administration (MSHA). This letter notified Herman that an MSHA special investigator had been appointed. (An April 25, 1980 letter from the special investigator to Herman is also in evidence.) By letter dated September 3, 1980, MSHA informed Herman that it had determined that illegal discrimination under the Act had not occurred. See 30 U.S.C. § 815(c)(2) & (3). Herman thereafter instituted this proceeding before the Commission in his own behalf pursuant to 30 U.S.C. § 815(c)(3).

> ... preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Burnett v. N.Y. Central R.R. Co., 380 U.S. 424, 428 (1965), quoting R.R. Telegraphers v. REA, 321 U.S. 342, 348-49 (1944). We find that the record in the present case underscores the above concerns. Although the operator was able to present testimony and documentary evidence in support of its position, the record is replete with examples of faded memories as well as the unavailability of potentially relevant evidence. To be balanced against this policy of repose, however, are considerations of whether "the interests of justice require vindication of the plaintiff's rights" in a particular case. Burnett, supra, 380 U.S. at 428. As discussed previously, we do not find justifiable circumstances excusing Herman's egregious delay in instituting this proceeding.

For these reasons, we affirm the dismissal of the complaint as untimely filed. 6/

Rosemary M Collyer
Rosemary M. Collyer, Chairman

Backley
Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

L. Clair Nelson
L. Clair Nelson, Commissioner

6/ In light of our conclusion we do not reach the judge's "alternative" discussion of the merits of the discrimination claim. Because the judge had decided that the complaint must be dismissed, his further discussion regarding whether under the circumstances discrimination occurred constitutes unreviewed dicta. Also, in light of our decision, other pending motions of the operator are denied.

Distribution

Richard O. Kwapil, Jr., Esq.
Woodburn, Wedge, Blakey and Jeppson
Sixteenth Floor
First Interstate Bank Bldg.
One East First Street
Reno, Nevada 89505

Mr. Joseph Herman
3525 San Mateo Avenue
Reno, Nevada 89509

Administrative Law Judge John Morris
Fed. Mine Safety & Health Rev. Commission
333 West Colfax, Suite 400
Denver, Colorado 80204

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 17, 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 80-129-M
CLEVELAND CLIFFS IRON COMPANY	:	
UNITED STEELWORKERS OF AMERICA, DISTRICT NO. 33 Intervenor	:	

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. IV 1980), and involves the interpretation and application of 30 C.F.R. § 55.12-16. The standard provides in pertinent part:

> Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment....

The administrative law judge concluded that the operator, Cleveland Cliffs Iron Company ("CCI"), violated the standard. 1/ We granted CCI's petition for discretionary review and heard oral argument. For the reasons that follow, we affirm.

The facts are undisputed. On May 19, 1979, an electrical apprentice was electrocuted while he and two other apprentices were rehanging high-pressure sodium light fixtures in the high bay of CCI's Empire Mill. After an investigation of the accident, MSHA issued a citation which stated:

> Apprentice electricians were assigned to relocate 1000 watt, High Pressure Sodium "Halophane Prismpack" lights, powered by 480 volts Alternating Current, on the ceiling above the primary grinding section in the concentrator. The lighting equipment was energized during installation....

1/ The judge's decision is reported at 3 FMSHRC 2324 (October 1981) (ALJ).

The light fixtures were hung on ceiling I-beams located approximately 80 to 100 feet above the floor of the mill. The operator had assigned the apprentices to move the light fixtures from one I-beam to another. The employees used an overhead crane and trolley assembly as a work platform. They placed an aluminum ladder on the crane trolley so they could reach the fixtures and electrical outlets during relocation.

The employees relocated the first light in the following manner: They moved the crane into position under the electrical outlet, put the ladder up against an I-beam to reach the plug, and unplugged the light. They took the ladder down, turned it 180 degrees and moved the crane trolley to a position where the ladder could reach the light fixture. They took the light fixture down, replaced its electrical cord with a longer cord, and wired the three-prong twist lock plug from the old cord onto the new. They then rehung the light fixture on another I-beam 8 to 10 feet away from its original location. Once more they turned the ladder 180 degrees, moved the crane trolley back underneath the electrical outlet, put the ladder back up, and plugged the light fixture with its new longer cord back into the electrical outlet.

In relocating the second light fixture, the employees changed the procedure to eliminate one of the 180-degree rotations of the ladder, because they believed these rotations on the elevated trolley were the most dangerous part of the operation. Under the new procedure, the fixture remained energized at several points during the process. When the employees took the fixture down from its hanger, they did not unplug it. After the light fixture was down, they unplugged it, replaced the cord with a longer one, reattached the plug, and plugged the fixture back into the energized 480 volt outlet. The employees then rehung the energized fixture in its new location. The relocation of the second fixture was accomplished without incident.

The fatal accident occurred as the employees were relocating the third light fixture, using the same procedure they had already used for the second. They removed the fixture from its hanger while energized, then unplugged it. They replaced the cord with a longer one, and wired the three-prong plug from the old cord onto the new. Before rehanging the fixture they replugged it into the energized 480 volt electrical outlet. As one of the employees climbed the ladder to rehang the energized fixture, he grasped the conduit of the fixture (a pipe-shaped stem) and received a fatal electric shock. 2/

The parties did not dispute before the judge that the second and third fixtures were energized at times during their relocation. In concluding that CCI violated the standard in connection with the

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2/ The shock occurred because the three-prong plug had been miswired. Once the miswired plug was inserted into the outlet, the conduit had become energized.

relocation of the lights, the judge determined that the light fixtures were "electrically powered equipment" and that the employees' handling, hoisting, and hanging the fixtures constituted "mechanical work." Before us, CCI makes two major arguments. First, it argues that the words "electrically powered equipment" and "mechanical work" indicate that the standard does not apply to the light fixtures involved in this case, but rather only to electrical equipment with moving parts. Second, the operator contends that the employees' relocation of the lights was not "mechanical work." 3/ We do not agree.

CCI's first argument amounts to a rewriting of the standard to apply to "electrically powered mechanical equipment." We must construe the standard as it is written; it uses the broad term "electrically powered equipment." "Mechanical" modifies "work," not "equipment." We accordingly reject CCI's narrow reading of this phrase. As to the light fixtures involved in this case, the judge correctly determined that they are "equipment" within the ordinary meaning of that word. The phrase "electrically powered" clearly includes equipment, such as the fixtures here, whose source of power is electricity. Therefore, we conclude that these 1000-watt high-pressure sodium light fixtures, powered by electricity rated at 480 volts, are "electrically powered equipment" within the meaning of the standard.

Finally, we consider whether the work involved in the relocation and installation of the fixtures was "mechanical work." The lights involved in this case were fixed, carried high voltage, and were located 80-100 feet above the floor. The light fixtures were large. The screw fittings and conduit assemblies were about five feet long. Taking the fixtures down, handling them, and rehanging them was relatively difficult and complex work given the nature of the job and the way it was necessary to accomplish the job. We conclude this work comes within the ordinary meaning of the words "mechanical work." We do not accept CCI's argument that if these activities constitute mechanical work, the standard would apply to the ordinary use or handling of energized portable electric equipment. Neither ordinary use, nor mere touching alone, nor portable equipment is involved here. Therefore, we conclude that under the facts of this case, mechanical work was being done on the light fixtures.

3/ CCI also argues that this standard does not protect against shock hazards, but only against mechanical hazards caused by equipment with moving parts. The plain language of the standard, however, imposes no such limitation. Where specific hazards are mentioned in other parts of section 55.12, they are shock or burn hazards. Such hazards are among the most common associated with equipment using electricity.

In sum, CCI's employees performed mechanical work on electrically powered equipment while the equipment was energized. Accordingly, we affirm the judge's conclusion that the operator violated 30 C.F.R. § 55.12-16. 4/

Rosemary M. Collyer
Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

L. Clair Nelson
L. Clair Nelson, Commissioner

4/ At one point in his decision, the judge stated: "The violation coupled with the accidental miswiring of the plugs, resulted in the ... fatal electrical accident...." 3 FMSHRC at 2337. We note that the miswiring did not constitute the violation. The violation occurred when the employees worked on the light fixtures while they were energized. The miswiring and the energizing of the conduit illustrate why mechanical work on energized electrical equipment is prohibited by the standard.

Distribution

Ronald E. Greenlee, Esq.
Clancey, Hansen, Chilman,
Graybill & Greenlee, P.C.
Peninsula Bank Building
Ishpeming, Michigan 49849

Harry Tuggle, Esq.
United Steelworkers of America
5 Gateway Center
Pittsburgh, PA 15222

Ann S. Rosenthal, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Ernest Ronn
United Steelworkers of America
706 Chippewa Square
Marquette, Michigan 49855

Paul Gravedoni
United Steelworkers of America
936 Baldwin Avenue
Megaunee, Michigan 49866

Administrative Law Judge Decisions

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 1 1982

CONSOLIDATION COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	CONTEST OF CITATION DOCKET No. PENN 82-89-R Citation No. 1143985; 2/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW COMMISSION, Petitioner v. CONSOLIDATION COAL COMPANY, Respondent	:	CIVIL PENALTY PROCEEDING DOCKET No. PENN 82-208 A.C. No. 36-00807-03113
	:	Renton Mine

DECISION

Apperances: Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company;
Janine C. Gismondi, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

These consolidated cases are before me, pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act") to contest a citation issued to the Consolidation Coal Company (Consol) pursuant to section 104(a) of the Act and for review of a civil penalty proposed by the Mine Safety and Health Administration (MSHA), for the violation charged in that citation. The general issue before me is whether Consol violated the regulatory standard at 30 CFR § 75.1725(a) as alleged in Citation No. 1143985 and, if so, whether that violation was "significant and substantial" as defined in the Act and interpreted by the

Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822. An appropriate civil penalty must also be assessed if a violation is found. Evidentiary hearings on these issues were held in Falls Church, Virginia.

The cited regulatory standard, 30 CFR § 75.1725(a) provides as follows:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The citation at issue reads as follows:

> The emergency escape hoist at Center Beach intake shaft was not maintained in a safe operating condition in that when the conveyance was lowered to the shaft bottom landing, the conveyance was being pulled under the shaft collar. Subsequently, when the conveyance was raised to the surface, it would contact the shaft collar and be jerked back and forth in the shaft.

The essential facts in this case, as alleged in the citation and as amplified by MSHA inspector Dennis Swentosky, are not in dispute. Consol argues only that those facts do not constitute a violation of the cited standard, and that even if those facts do constitute a violation of the standard, that the violation was not "significant and substantial". Inspector Swentosky testified that on February 12, 1982, he was helping MSHA Inspector Gerald Davis check the emergency escape hoist at the Center Beach intake shaft. Swentosky observed the capsule being raised three times. Because of the high velocity of the mine ventilation, each time the capsule was raised, it moved under and contacted the shaft collar. The capsule then proceeded to swing back and forth in the shaft (though not striking the shaft) as it was raised.

Inspector Davis testified that he had observed the same problem with the capsule during seven or eight trips on October 2, 1980. A citation was issued at that time under the regulatory standard at 30 CFR §75.1704. According to Davis, various modes of corrective action could have been taken to prevent the capsule from striking the shaft collar. He observed that rails could have been placed on the platform, a guiderope could have been run down the full length of the shaft, wire ropes or a grating could have been placed across the entry to prevent the capsule from deviating off course, or the platform itself could have been raised to elevate it above the effect of the ventilation.

While not disputing this evidence, Consol argues that the cited standard addresses only the maintenance, in safe operating condition, of mobile and stationary machinery and equipment. More specifically, Consol argues that the standard protects only against intrinsic defects in machinery and equipment that would affect safe operation. Thus, Consol argues that since the only defects alleged by MSHA in this case were factors extrinsic to the escape capsule itself, there was no violation of the cited standard. Indeed, all of the cases involving this standard cited by the Secretary in his brief involve inherent defects in the equipment itself. See Mid-Continent Coal and Coke Company, FMSHRC 1501 (1979), aff'd, 2 MSHC 1450 (10th Cir., 1981) in which an airlock door was found to have been maintained in an unsafe condition due to a frayed cable and faulty lever on the hoist assembly used to open the door; Peabody Coal Co., 3 FMSHRC 2410 (1981) in which a conveyer was found to have been maintained in an unsafe operating condition due to faulty belt rollers; and Amherst Coal Co., 2 FMSHRC 597 (1980) in which a scoop was found to have been maintained in an unsafe operating condition due to an inoperative emergency switch and exposed lead wire.

However, even assuming, arguendo, that the standard is limited in application to intrinsic defects in machinery or equipment, I would nevertheless find a violation in this case. There does not seem to be any dispute, and in any event I find, that the movement of the escape capsule into the shaft collar was not safe (whether or not it was a "significant and substantial" hazard). Inspector Davis implied moreover, that one method of correcting the unsafe condition would be to modify the capsule itself by attaching it to a guide rope running the full length of the shaft. Thus, one method of abatement implicitly called for modifications to what may be considered defects intrinsic to the capsule itself. The fact that other options for abatement also existed which were extrinsic to the escape capsule and that the operator indeed may have chosen one of those modes of abatement is immaterial.

In any event, it is apparent that the citation charges that the emergency escape hoist system (not merely the escape capsule as an isolated piece of equipment or machinery) was unsafe. Thus, if any part of that integrated system of machinery and equipment was not being maintained in a manner in which the entire system could have been safely operated, then there was a violation of the cited standard. Here the evidence shows that there were intrinsic defects in that system of machinery and equipment that allowed the capsule to strike the shaft collar. The system was therefore in an unsafe condition in violation of the cited standard.

Whether that violation is "significant and substantial", however, depends on whether, based on the particular facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in a injury of a reasonably serious nature. Secretary v. Cement Division, National Gypsum Co., supra. The test essentially involves two considerations, (1) the probability of resulting injury, and (2) the seriousness of the resulting injury. In this regard, it is interesting to note that the same condition cited in this case had on a prior occasion been found by MSHA not to have been "significant and substantial" under the more liberal definition of that concept then in effect. In any event, I find MSHA's evidence concerning the alleged hazards associated with the cited conditions to be highly speculative. For example, Inspector Swentosky speculated that a person in the capsule strapped to a stretcher with serious neck injuries could possibly sustain further injuries if the capsule struck the collar with sufficient force. He also speculated that someone might receive knee injuries from bouncing against the side of the capsule. While he thought knee injuries could "possibly" occur, he was not aware that any such injury had ever occurred. Moreover, Swentosky agreed that he did not consider the use of the capsule in the condition cited to be imminently dangerous nor did he deem it necessary to have it removed from service. He did not know whether the emergency hoist at issue had ever previously been used or whether the rate of ascent could be controlled at a slow rate of speed --factors important to ascertaining the probabilities.

Inspector Davis also speculated that if the capsule got caught under the collar, the bridle chain might be stretched and damage the wire rope at that location. There is no evidence, however, that the capsule ever did get caught under the collar in spite of extensive testing. Moreover, since the top of the capsule was tapered, it appears unlikely that it could get caught under the collar. While Davis also observed that the capsule once hit the side of the shaft so hard that it severed the communications cable -- a cable about as thick as standard house wire -- I am unable to translate that incident to any probable hazard of a serious nature.

There is also divergence of opinion as to the severity of the hazard. Mine Superintendent Andrew Hathaway testified for example that during tests on February 13, 1982, he saw the capsule scrape the shaft collar, but not violently, and only "about 50% of the time or less". Moreover, according to Hathaway the capsule had been used only three times since 1975 and had never been used in an emergency.

Within this framework of evidence, it does not appear likely that the hazard contributed to would have resulted in any serious injuries. Accordingly, I do not find that the violation in this case was "significant and substantial". For the foregoing reason, I also do not find a high level of gravity associated with the violation. I find, however, that Consol was negligent in allowing the unsafe condition to have existed without apparent correction for more than a year. The evidence shows that the operator did abate the condition in a timely manner after the citation herein was issued. There is no dispute that the operator is large in size and that the mine at issue has a fairly substantial history of violations. Under the circumstances, I find that a civil penalty of $250 is appropriate.

Order

Citation No. 1143905 is affirmed, however, the "significant and substantial" findings made therein are hereby stricken. The Consolidation Coal Company is ordered to pay a civil penalty of $250 for the cited violation within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: Page 5.

Distribution: By certified mail.

Robert M. Vukas, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241

Jeanine C. Gismundi, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelplhia, PA 19104

Harrison B. Combs, Jr., Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, DC 20005

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 21 1982

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST OF CITATION
v.		Docket No. PENN 82-89-R
	:	Citation No. 1143985; 2/12/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Renton Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 82-208 A.C. No. 36-00807-03113
v.	:	Renton Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

AMENDED DECISION

The decision in these cases is hereby amended so that the docket number in the above-captioned Civil Penalty Proceeding shall become PENN 82-208A. New docket number PENN 82-208B will include Citations No. 840955 and 840956 (2/1/82), and all pleadings corresponding to those citations heretofore filed by the parties in Docket No. PENN 82-208 are hereby incorporated in Docket No. PENN 82-208B.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Robert M. Vukas, Esq., Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241

Jeanine C. Gismundi, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Harrison B. Combs, Jr., Esq., United Mine Workers of America, 900 Fifteenth Street, N.W., Washington, DC 20005

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 6 1982

CONSOLIDATION COAL COMPANY,
Contestant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

Contests of Order

Docket No. PENN 82-64-R
Order No. 1143777; 1/12/82

Docket No. PENN 82-66-R
Order No. 1142931; 1/13/82

Renton Mine

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
CONSOLIDATION COAL COMPANY,
Respondent

Civil Penalty Proceedings

Docket No. PENN 82-134
A.C. No. 36-00807-03112V

Docket No. PENN 82-109
A.C. No. 36-00807-03109V

Renton Mine

DECISION

Appearances: David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Robert M. Vukas, Esq., Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Administrative Law Judge Broderick

STATEMENT OF THE CASE

Docket No. PENN 82-64-R is a contest of Order of Withdrawal No. 1143777 issued January 12, 1982, under section 104(d)(1) of the Act. The order refers back to Citation No. 1143669 issued December 18, 1981. Docket No. PENN 82-134 is a civil penalty proceeding seeking a penalty for the violation alleged in Order No. 1143777.

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Docket No. PENN 82-66-R is a contest of Order No. 1142981 issued January 13, 1982, under section 104(d)(1) of the Act. This order refers back to Citation No. 1143669 issued December 18, 1981. Docket No. PENN 82-109 is a civil penalty proceeding seeking a penalty for the violation alleged in Order No. 1142981.

Citation No. 1143669 was issued under section 104(d) [illegible] the Act. It was contested before Judge Gary Melick who found that the violation charged occurred, but that it was not "significant and substantial." Consolidation Coal Co. v. Secretary of Labor, 4 FMSHRC 1533 (1982). This decision in effect converted the 104(d)(1) citation to a 104(a) citation.

Consolidation Coal Co. moved for summary decision vacating the two orders contested herein on the ground that there is no longer a valid underlying 104(d)(1) citation to support them. The Secretary moved to modify Order No. 1143777 issued January 12, 1982, to a 104(d)(1) citation which would then serve as the underlying 104(d)(1) citation for Order No. 1142981. I reserved decision on the motions.

Since the cases involve a common issue of law and all arose in the same mine at about the same time, they are hereby CONSOLIDATED for the purpose of decision.

Pursuant to notice, the cases were heard on the merits in Pittsburgh, Pennsylvania, on October 13, 14 and 15, 1982. Dennis J. Swentosky and Richard J. Silka, Federal coal mine inspectors and Daniel Fitzroy testified for the Secretary of Labor. Larry Cuddy, Randy Debolt, Melvin Burkes and John Koma testified for Consolidation Coal Company.

The parties waived the right to file written proposed findings of fact and conclusions of law. Based on the entire record, and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT COMMON TO ALL DOCKETS

1. At all times pertinent to these proceedings, Consolidation Coal Co. (Consol) was the owner and operator of the Renton Mine in Allegheny County, Pennsylvania. Consol is a large operator, and the imposition of a penalty will not affect its ability to continue in business.

2. In the 20-month period prior to the date of the orders contested herein, the operator had a history of 595 assessed violations.

3. The operator demonstrated good faith in abating the conditions alleged in the contested orders.

FINDINGS OF FACT - DOCKET NOS. PENN 82-64-R AND PENN 82-184

1. On January 12, 1982, Richard Silka, a Federal coal mine inspector and a duly authorized representative of the Secretary of Labor, issued an order of withdrawal to Consol under section 104(d)(1) of the Act, charging a violation of 30 C.F.R. § 75.400.

2. On January 12, 1982, there were accumulations of fine powdered coal, fine coal and lump coal along the tracks and between the tracks outby the loading ramp of the 14 and 15 South sections of the subject mine. The accumulations extended for a distance of approximately 75 to 100 feet along and between the rails, and for an additional 100 feet along the tight side rail. The accumulations for the first 75 - 100 feet were approximately 4 feet in width and from 6 to 8 inches deep. The accumulations along the tight side rail were 1 to 2 feet wide and 6 to 8 inches deep. There was a D.C. car haul unit between the rails extending for about 40 feet in the affected area. This was a steel structure which occupied most of the area between the rails and extended from the floor almost as high as the rails. The accumulations between the rails in this area therefore, were not as great as they appeared, and were not as deep as in other areas cited.

3. Mine cars were present on the track along the area cited. The cars were approximately 7 feet wide, and extended out over the tracks about 13 inches on each side. The accumulations between the rails were therefore largely under the cars. The cars were described as "possum bellies" and the bottom of the car came down almost to the level of the track. Therefore, it was difficult to see under the cars.

4. The ground wire was not properly connected to the return feed wire to the radio unit just outby the belt entry along the track approximately 2 to 3 feet from the accumulations of coal and coal dust.

5. The conduit switch to the pump was not properly entered into the pump box and the frame was not connected to the feed wire. This was approximately 2 to 3 feet from the accumulations of coal and coal dust cited herein.

6. There was a 250 Volt D.C. trolley wire hung from the roof about 6 feet above the track on the tight side. The trolley motor does not normally come within 600 to 1,000 feet from the accumulations cited herein.

7. Inspector Silka arrived at the area in question about 1:50 p.m. on January 12, 1982. The area had been inspected by company mine examiners at 5:20 a.m. and at 1:20 p.m. on the same day.

8. In the 15 months prior to the issuance of the order challenged herein, 26 violations of the standard in 30 C.F.R. § 75.400 were issued to the subject mine, nine of them involving ramp areas.

STATUTORY PROVISION

Section 104(d)(1) of the Act provides as follows:

> (d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

REGULATORY PROVISION

30 C.F.R. § 75.400 provides as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

ISSUES - DOCKET NOS. PENN 82-64-R AND PENN 82-134

1. After an order issued under section 104(d) has been contested before the Commission, may MSHA or an administrative law judge modify it to a 104(d)(1) citation?

2. Was a violation of the standard in 30 C.F.R. § 75.400 established?

3. If a violation occurred, was it of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard?

4. If a violation occurred, was it caused by an unwarrantable failure of the operator to comply with the standard in question?

5. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW - DOCKET NOS. PENN 82-64-R AND PENN 82-184

1. Consol was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Renton Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. The Secretary's motion to modify the 104(d)(1) order contested herein to a 104(d)(1) citation is hereby GRANTED.

DISCUSSION

Subsequent to the hearing in these cases, the Commission upheld the action of Judge Gary Melick in modifying an invalid 104(d)(1) withdrawal order to a 104(d)(1) citation. Secretary of Labor v. Consolidation Coal Company, 4 FMSHRC 1791 (1982). That case was similar to the present one in that the 104(d)(1) citation underlying the contested order had been modified by the Judge to a 104(a) citation in a prior proceeding, and Consol moved for summary decision on the ground that the order lacked the required underlying 104(d)(1) citation. Prior to the hearing, the Judge modified the contested order conditioned on evidence showing a significant and substantial violation and an unwarrantable failure to comply.

In the present case the necessary special findings ("S&S") were contained in the order when it was issued. Consol argues that it contested a withdrawal order which required immediate abatement and that it is not fair to permit the modification sought here, since it must in effect contest a citation with immediate withdrawal, an entity not recognized in the Act. There was no showing, however, of prejudice or surprise, no showing that its defense to a (c)(1) citation would differ from its defense to a (c)(1) order. See 4 FMSHRC at 1795. The modification here was accomplished on motion of the Secretary, although the Secretary also issued and submitted in evidence a copy of the modification form it issued to Consol. The Commission held that the proper procedure for modification after a notice of contest has been filed is by motion. Id. On the authority of the Commission decision, I am granting the motion to modify the contested order to a 104(d)(1) citation.

3. On January 12, 1982, a violation of 30 C.F.R. § 75.400 was established in that loose coal and coal dust was permitted to accumulate in active workings along and between the tracks outby the loading ramp of the 14 and 15 South sections of the subject mine. The operator did not present any evidence to contest the fact of violation.

4. The violation referred to above was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The test for a "significant and substantial" violation, laid down by the Commission in Secretary v. Cement Division, National Gypsum Company, 3 FMSHRC 822, is the reasonable likelihood that the hazard contributed to will result in injury or illness of a reasonably serious nature.

The hazard contributed to by accumulations of loose coal and coal dust is a mine fire or explosion. Whether it is reasonably likely to occur depends upon (1) the nature and extent of the accumulations; and (2) the existence of sources of ignition. If a fire or explosion occurred it is clearly likely to cause injuries or illnesses of a reasonably serious nature.

The accumulation cited here was substantial -- it extended a distance of almost 200 feet, was 2 to 4 feet wide and 6 to 8 inches deep. The top 2 inches was fine powdered dust or float dust. Approximately 25 percent of the total accumulation consisted of coal dust; the remainder was loose coal. The testimony is conflicting as to whether there was an ignition source in the area of the accumulations. I find that the trolley wire was not a potential source of ignition, since the motor did not come closer than 700 feet from the accumulations. However, I regard the improperly connected ground wire to the radio, and the ground wire not connected to the pump as potential sources of ignition especially in the presence of float coal dust. The float coal dust in itself has the capacity to propagate a mine fire or an explosion. Because of these factors, I find the violation was significant and substantial.

5. The violation resulted from the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

The extent of the accumulation was such that it had to have been there for at least half a shift or 4 hours prior to the inspector's arrival. The operator had been cited on many prior occasions for violations of the standard in question. Because of this, special care should have been taken to avoid repetition. The mine examiners who examined the area prior to the inspection testified that they did not observe the accumulations, and I accept their testimony as truthful. In fact, when walking along the wide side of the tracks, the accumulation, which was between the tracks and on the tight side, was difficult to see. It clearly could have been seen if the examiner was instructed to look between the cars or get down and look under the cars. I find that the condition was such that the operator could have and should have known of its existence.

6. The violation was serious, and was caused by the operator's negligence. The operator is a large operator and has a substantial history of prior violations. I conclude that an appropriate penalty for the violation is $750.

FINDINGS OF FACT - PENN 82-66-R AND PENN 82-109

1. On January 13, 1982, Dennis Swentosky, a Federal coal mine inspector, and a duly authorized representative of the Secretary of Labor, issued an order of withdrawal under section 104(d)(1) of the Act to Consol charging a violation of 30 C.F.R. § 75.1002-1(a).

2. On January 13, 1982, two non-permissible breaker boxes for shuttle cars were located 113 feet and 120 feet respectively from the outby corner of the pillar block being mined. The boxes were approximately 160 feet and 175 feet from the two places in the pillar which were being mined or the active cuttings.

3. In the coal mining industry, the term pillar workings refers to the gob area and the pillar or pillars being mined.

4. In retreat mining, when a pillar is mined out and the roof collapses, the air including possible methane from the gob area is forced outby.

5. Mining had been done on the shift prior to that during which the order was issued. This mining involved the pillar in question and the breaker boxes were in the same location. One split had been mined through the pillar and a cut had been taken from a second split. The mining was being done with a continuous miner equipped with a methane monitor.

6. No methane was detected by the inspector at the pillar split at the time the order was issued.

7. The subject mine does liberate methane and is considered a gassy mine. Methane is more likely to be encountered in retreat mining than it is in development mining.

8. The nonpermissible breaker boxes are used to turn power on and off the shuttle cars and an arc can occur when this is done. An arc can also occur in the event of a short in the box.

9. The air readings taken in the section in question showed good ventilation. The bleeders were functioning properly and breaker posts were set to limit the area of the roof fall.

REGULATORY PROVISION

30 C.F.R. § 75.1002-1(a) provides as follows:

> (a) Electric equipment other than trolley wires, trolley feeder wires, high-voltage cables, and transformers shall be permissible, and maintained in a permissible condition when

> such electric equipment is located within 150 feet from pillar workings, except as provided in paragraphs (b) and (c) of this section. [Paragraph (b) provides an exception for certain nonpermissible equipment prior to March 30, 1974; paragraph (c) excepts equipment for which a permit for non-compliance has been issued.]

ISSUES

1. Were the nonpermissible breaker boxes involved herein within 150 feet of "pillar workings" on January 13, 1982?

   (a) Should the measurement to the nonpermissible equipment be taken from the outby corner of the pillar being mined or from the actual place of the cut?

2. If a violation was established, was it of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard?

3. If a violation occurred, was it caused by an unwarrantable failure of the operator to comply with the standard in question?

4. If a violation occurred, what is the appropriate penalty?

CONCLUSIONS OF LAW - DOCKET NOS. PENN 82-66-R AND PENN 82-109

1. Consol was subject to the provisions of the Federal Mine Safety and Health Act in the operation of the Renton Mine at all times pertinent hereto, and the undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. There is a valid underlying 104(d)(1) citation for the contested order, namely the one referred to in Docket No. PENN 82-64-R.

3. On January 13, 1982, a violation of 30 C.F.R. § 75.1002-1(a) was established in that two non-permissible breaker boxes for shuttle cars were located within 150 feet of pillar workings in the subject mine.

DISCUSSION

The term "pillar workings" is not defined in the regulations. The MSHA underground inspector's manual directs that the 150 foot distance be measured from the non-permissible equipment in question to the nearer of (a) the outby edge of the pillar being mined, or (b) the inby edge of the solid pillars immediately outby the previously pillared area. The inspector testified that this has long been MSHA's policy and that the policy is well known in the industry. He further testified that the term pillar workings is a broad term and includes the gob area and the entire block or blocks being mined. Consol's Safety Department had been given a copy of the MSHA Inspector's Manual. Citations have been issued to Consol previously for violations of the standard in question. The State of Pennsylvania standard requires measurement from the electrical equipment to the actual working face. Consol's general mine foreman was aware of the MSHA policy and knew that the breaker boxes were within 150 feet of the outby corner of the pillar being mined. He disagreed with the definition of pillar workings, however, and stated that he would consider it as referring to the actual working face.

It would clearly be preferable to have the term pillar workings defined in the regulations. The definition assumed by MSHA, however seems to me to be a reasonable one, and much more satisfactory and practical than any other definition suggested. If the distance is measured from the working face to the electrical equipment, it would change as the block was being mined and might require shutting off the power and moving the equipment before the pillar was completely mined. I accept the testimony of the inspector that the term pillar workings means the gob and the entire pillar or pillars being mined, and that this definition is known and followed in the mining industry.

4. The violation referred to in Conclusion of Law No. 3 was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

DISCUSSION

The hazard which the standard is designed to prevent is an ignition or explosion which could result from methane being forced back over electrical equipment which may arc. Although methane was not detected at the time of the citation, the mine is a gassy mine, and methane is likely to be encountered in retreat mining. If methane was forced back over non-permissible electrical equipment, and an ignition or explosion occurred, serious injuries to miners would be likely. My conclusion is based in large part on the inspector's testimony, but I have considered the testimony of Larry Cuddy to the effect that the bleeder system would prevent methane buildup in the gob and the breaker posts would prevent a running fall. The hazards of methane in underground mining are too well known to require documentation, as is the unpredictability and suddenness of its appearance.

5. The violation referred to in Conclusion of Law No. 3 resulted from the unwarrantable failure of the operator to comply with the standard.

DISCUSSION

Randy Debolt, General Mine foreman of the Renton Mine, recognized before the order was written that there was a violation of the standard. Larry Cuddy, section foreman, stated that he made a mistake by measuring from the working face to the shuttle car boxes. He testified that he did so because the State of Pennsylvania requires measurement from that point. I accept Mr. Cuddy's testimony as truthful, but I conclude that he should have known that the condition constituted a violation of the Federal standard. On that basis, I conclude the violation was unwarrantable.

6. The violation was serious, and was caused by the operator's negligence. The operator is a large operator and has a substantial history of prior violations. I conclude that an appropriate penalty for the violation is $750.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, IT IS ORDERED:

1. Order of Withdrawal No. 1143777 issued January 12, 1982, modified herein to a 104(d)(1) citation, charging a significant and substantial violation and an unwarrantable failure to comply is AFFIRMED as modified.

2. Order of Withdrawal No. 1142981 issued under section 104(d)(1) on January 13, 1982, is AFFIRMED.

3. Consolidation Coal Company shall within 30 days of the date of this decision pay the sum of $1,500 for the two violations found herein to have occurred.

James A Broderick
James A. Broderick
Administrative Law Judge

Distribution: By certified mail

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

David T. Bush, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

DEC 6 1982

ALLIED CHEMICAL CORPORATION,	:	Contest of Citation
Contestant	:	
	:	Docket No. WEST 82-97-RM
v.	:	Citation No. 578873; 1/5/82
	:	
SECRETARY OF LABOR,	:	Alchem Trona Mine
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION AND ORDER

This matter is before me under a reservation of jurisdiction relating to the proper interpretation of a mandatory safety standard relating to metal and nonmetal underground mines. The standard in question provides:

> Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length. 30 C.F.R. 57.9-7.

The operator paid a penalty of $300 for failure to provide an operative stop cord along the west side of its 2,000 foot conveyor but contests any interpretation of the standard that would require such a cord along the east side of the conveyor.

The stipulated facts show there are walkways down both the east and west side of the beltline and that while the west side is the side designated as the walkway miners are regularly assigned to clean muck from positions on the east walkway. This occurs at least two shifts a month. Further, miners assigned to clean spillage on the east side of the belt are required to travel a distance of 40 feet to and from the crosscut through which they gain access to the east walkway.

The operator's reliance on Secretary of Labor v. Magma Copper Company, 1 FMSHRC 83., 837 (1979) is obviously misplaced. There the trial judge held that the Secretary failed to prove that the walk or travelway in question was "regularly used and designated for persons to go from one place to another". 30 C.F.R. 57.2 (Definitions). While I accept the

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operator's contention that 57.2 applies to walkways, I find the east walkway was a designated workplace for miners and that as such it constituted a designated walk or travelway within the meaning of 57.2 and 57.9-7.

The intent of the standard, as the operator admits, is to protect miners who on a regular and frequent basis, use a designated walkway for movement to and from their regular duty stations. Since the agreed facts show the east side of the beltway is a regular duty station frequented by miners at least two shifts a month, it is clear that the hazard presented by the moving beltline is one against which the standard was directed.

The fact that a miner is stationed on the west side of the beltline for the sole purpose of pulling the stop cord in the event of an emergency on the east side is no defense to the failure to provide a stop cord on the east walkway. First I find it highly unlikely that the operator can always be depended upon to send three men to do the work of two, especially in the face of economic layoffs and reduced workforces that prevail in most mines. Second I find nothing in the standard that permits the arrangement posited by the operator without action by the Secretary on an appropriate petition for modification. Third, as the Secretary points out, the stop cord is intended as an individual safety device that should not depend for its activation on some form of communication between individuals who may be widely separated and where time and awareness of the danger may be of the essence in preventing a serious injury.

The premises considered, therefore, it is ORDERED that the operator's contest of the citation in question be, and hereby is, DENIED and the validity of the citation AFFIRMED.

Joseph B. Kennedy
Joseph B. Kennedy
Administrative Law Judge

Distribution:

John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, Suite 1600, 50 South Main Street, Salt Lake City, UT 84114 (Certified Mail)

Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

DEC 7 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. WEST 81-272-M A.O. No. 35-02875-05005
v.	:	Applegate Aggregates Bar
M & H ROCK, INC., d/b/a APPLEGATE AGGREGATES, INC., a corporation, Respondent	:	

DECISION

Appearances: Faye Von Wrangel, Attorney, U.S. Department of Labor, Seattle, Washington, for the petitioner; Ernest W. Mignot, Grants Pass, Oregon, *pro se*, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for two alleged violations of certain mandatory safety standards. Respondent filed a timely answer and notice of contest and a hearing was convened in Medford, Oregon, on October 28, 1982 and the parties appeared and participated fully therein. The parties waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 *et seq*.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 *et seq*.

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Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Discussion

The citations issued in this case were served on the respondent by MSHA Inspector George A. Gipson pursuant to Section 104(a) of the Act during the course of an inspection of the mine site on March 18, 1981, and they are as follows:

Citation No. 345579, 30 CFR 56.14-1:

> The ralls crushing V-Belt drive unit was not completely guarded. The exposed pinch point was within easy contact being located four feet above ground level and near the walkway leading to the ladder to the feed crusher operations platform.

Citation No. 345580, 30 CFR 56.11-2:

> The elevated walkway around the wet plant was not provided with adequate handrails. Handrails had been installed but was not maintained in good condition. The corner post was broken off at the base causing the cable railing to be one foot above the floor level. The walkway floor was 8 1/2 feet above ground level.

Petitioner's testimony and evidence

MSHA Inspector George A. Gipson, testified as to his background and experience and confirmed that he inspected the respondent's sand and gravel plant on March 18, 1981, and plant foreman Bruce Ogden and owner

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Bill Migno[illegible] were with him at that time. Inspector Gipson described the crushing plant operation, and he observed three people at the plant on the day of his inspection. One was working in the pit area with a loader, another was operating a loader in the crusher area, and a foreman was in the area. Mr. Ogden accompanied him on the walk-around inspection of the entire plant, and Mr. Gipson confirmed that he inspected the ralls crusher, and he described its operation. He identified a photographs of the crusher and described the area which he believed was not guarded (Tr. 9-14, exhibit C-1).

Mr. Gipson described an area on the crusher labeled as "side guard" on exhibit C-1 as a metal screening cloth which was on the crusher when he observed it. The area which was not guarded, including the alleged "pinch point" is labeled on the exhibit and he identified it as the area which was not guarded. Mr. Gipson believed that an employee could come in contact with the pinch point area between the belt and the pulley. He identified a corner of a ladder in the lower right-hand corner of exhibit C-1, and he believed that an employee walking up to that ladder next to the piece of plywood shown on the exhibit could somehow come in contact with the exposed pinch point. Mr. Gipson indicated that an employee usually was stationed on a platform at the top of the ladder observing the crusher operation, but that he would also clean-up under the pulley. On the day of the inspection he observed an employee cleaning up (Tr. 19).

Mr. Gipson testified that he measured the distance from the pinch point to the ground, and that it was four feet or waist high to a person walking by (Tr. 20). The hazard associated with the unguarded pinch point was someone catching their finger or hand in the moving unit, and at the time he observed the condition it was in operation and moving (Tr. 20). The operation was immediately shut down, and a guard was fabricated and installed (Tr. 17).

Mr. Gipson identified exhibit C-2 as a photograph of the handrail around the elevated screener area which he cited in citation 345580. He described the post which had been knocked down and stated that it "was dangling low within about a foot of the actual walk platform (Tr. 20). Mr. Gipson stated that the walkway area was elevated some eight and one-half feet from ground level, and a conveyor belt ran out from under the elevated area (Tr. 22). Mr. Gipson testified that the condition of the handrail was a hazard because it could not be used for grasping to prevent anyone from falling over the edge. It also posed a tripping hazard for anyone attempting to walk around the posts and cable which had fallen over (Tr. 2[illegible]). The post was immediately put back in place and welded, and the respondent did a good job in this regard (Tr. 23).

On cross-examination, Mr. Gipson confirmed that the primary reason for anyone going back and forth by the unguarded area would be to go up and down the ladder, and he believed that an employee would be "within arm's reach of this pulley to get to the ladder" (Tr. 25). However, he conceded that he did not measure the distance from the edge of the ladder to the exposed pinch point, and he also conceded that there would be no hazard while climbing the ladder. However, he believed there would be a hazard "as you walk by here or trip or whatever and extended a hand into that pinch point" (Tr. 26). The area around the bottom of the ladder was all open area, and he believed that the piece of plywood shown in the exhibit C-1 was there to provide protection for a conveyor belt running under the pulley area in question. Mr. Gipson also indicated that someone walking to the ladder could trip or extend a hand out and come into contract with the pinch point (Tr. 27).

With regard to the handrail citation, Mr. Gipson stated that he measured the distance from the top of the cable where it "dips" in the exhibit C-2, to the platform floor and that the distance was approximately 12 inches (Tr. 30). The cable is a metal type used for hoisting, and it is very substantial once it is in place. The work platform around the screening is normally used for maintenance work, and no one is there when the crusher machine is operating. Although the inspector did not measure the width of the walkway, Mr. Mignot indicated that it was eight feet wide and seven feet long, and this was the "service area" from which any maintenance would be performed, and normally, one or two men would be on the platform at any given time (Tr. 34). Mr. Gipson confirmed that his concern was that someone could fall over the edge of the platform, and he conceded that the "elevated walkway" was not an area where miners normally would pass going and coming from their work stations, and that the only time anyone would go there would be to perform some specific maintenance work (Tr. 36).

Respondent's testimony and evidence

Ernest W. Mignot, owner and operator of the mine in question, testified as to his operation during the time the citations were issued. He indicated that his approximate annual production was 100,000 tons of crushed rock. He also testified that some of his trucks and equipment were manufactured out of state, that he sells his product to a number of customers, including the State of Oregon for use in road construction, and to the Federal Bureau of Land Management and the Department of Agriculture. Other customers include local road and paving contractors (Tr. 37-41).

Mr. Mignot argeed that the photographs taken by the inspector, exhibits C-1 and C-2 were in fact photographs of the conditions cited by the inspector in the two citations in question.

With regard to the guarding citation concerning the crusher V-belt drive (345579), Mr. Mignot testified that the distance from the ladder as shown in exhibit C-1 to the pinch point in question was approximately 6 1/2 feet. He indicated that the distance from the ladder to the edge of the steel frame in front of the belt drive was four feet, and from that point the distance to the pinch point was 2 1/2 feet.

Mr. Mignot testified that the normal route for one to take when approaching the ladder to get to the platform above, or to climb off the ladder when descending from the platform, was directly in front of the ladder. He identified the piece of plywood which appears in the photographic exhibit C-1 as a guard for a chute which runs under the

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belt in question. He also indicated that no one would have any reason to be in the corner area adjacent to the belt area and at the edge of the platform, and he believed that the only way one could get their hand caught in the pinch point was to deliberately reach in. He also indicated that any maintenance work which would have been performed in that area would only be done after the crusher plant was shut down.

With regard to the handrail citation (345580), Mr. Mignot stated that the distance between each of the cables as shown in the photographic exhibit C-2 was 18 inches, and that the distance between the platform floor and the first cable was 18 inches. He conceded that these distances were when the entire handrail and supports were upright, and he further conceded that the handrail was in the condition shown in the photograph at the time the citation was issued (Tr. 41-44).

Mr. Mignot testified that the handrail cables and support posts were of steel construction and he confirmed that the support post shown to the right in the photograph was dislodged when a loader struck it when it was raising a screen from the ground-level to the platform. He also conceded that men were required to be on the platform area from time to time while performing maintenance work, but he did not believe they would be exposed to any danger of falling over the edge of the platform because the total work area of the platform is eight feet by seven feet, and any maintenance work would be performed closer to the crusher rather than the edge of the platform. He indicated further that the crusher would be shut down for maintenance, and he believed that the handrails as shown in the photograph would protect anyone from falling or tripping over and that one would have to be drunk to fall over the cable (Tr. 44-46).

Findings and Conclusions

Jurisdiction

In its answer to the proposal for assessment of civil penalties filed by the petitioner, the respondent admitted that it has been "operating a mine, a worksite and place of employment for miners". However, it denied the assertion made by the petitioner that its mining operation is subject to the Act. Based on all of the evidence and testimony now of record in these proceedings, it seems clear to me that the respondent's sand and gravel operation is a "mine" within the meaning of the Act, and that the respondent is in fact subject to the Act as well as to MSHA's enforcement jurisdiction. The mine has been regularly inspected by MSHA's inspector force, and the nature of the mining activities as stated in the record of testimony during the hearing clearly establishes jurisdiction, and any aguments to the contrary by the respondent are rejected.

Fact of Violation - Citation No. 345579

This citation charges the respondent with a violation of mandatory safety standard 30 CFR 56.14-1, for failure to completely guard an exposed

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pinch point which the inspector alleged was "within easy contact". The standard provides as follows:

> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

In this case, the facts show that the inspector measured the distance from the pinch point to the ground, which he found to be four feet or "waist high". Coupled with his belief that a waist high pinch point "near the walkway leading to the ladder" constituted a hazardous area which was required to be guarded, the inspector issued the citation. However, the respondent has established through credible testimony that the distance from the edge of the ladder to a steel frame running along the pulley in question was four feet, and from that area to the pinch point there was another two and one-half feet. In short, the respondent has established that if someone were to fall from the ladder and reach out, he would be some six and one-half feet from the pinch point. Given these circumstances, it is highly unlikely that anyone would get caught in the pinch point as a result of tripping or falling while going up or down the ladder in question to reach a platform above the machine in question.

The photographic exhibit C-1, reflects that the front of the pinch point area which concerned the inspector was guarded with a wire mesh screen. A piece of plywood, which the inspector found to be an adequate guard, protected anyone from falling into a conveyor belt which ran under the machine in question, and the steel framing of the machine running alongside the pinch point provided a measure of protection and was some two and one-half feet from the pinch point itself. The inspector indicated that his primary concern was that someone going or coming from the ladder could reach into the pinch point if he were to trip or stumble. I find this highly unlikely since a person would have to fall six and one-half feet horizontally to get his hand into the pinch point. As for anyone getting caught while cleaning up, I find this to be highly unlikely also. Based on the position of the pinch point, I believe that one would have to make a conscious effort to stick his hand into the pulley area which apparently troubled the inspector.

Mr. Mignot testified that no one has any business or reason to be near the pulley in question and that when maintenance is performed the whole plant is shut down (Tr. [illegible]). Mr. Mignot also established to my satisfaction that anyone approaching the ladder for the purpose of climbing up to the platform would approach it from the front, and he would have no reason to walk back to the corner of the machine where the pulley was located inside the steel framing of the machine, and then walk back and over to the ladder. Given all of the prevailing circumstances, I conclude and find that the exposed pulley area which was cited in this case was not required to be guarded, and the citation IS VACATED.

Citation No. 345580

This citation charges the respondent with a violation of mandatory safety standard 30 CFR 56.11-2, for failure to provide an adequate handrail around an elevated walkway. The standard provides as follows:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

It seems clear to me in this case that the cited handrail was not of substantial construction or maintained in good condition at the time the inspector observed the condition. Mr. Mignot candidly admitted that the handrail had apparently been dislodged when struck by a loader, and he did not dispute the fact that it was in the condition shown in the photograph, exhibit C-2. Most of his testimony in defense of the citation goes to the question of gravity and the likelihood of someone falling over the edge of the platform. Insofar as the fact of violation is concerned, I conclude and find that the petitioner has established a violation of section 56.11-2, and the citation IS AFFIRMED.

Good Faith Compliance

The record establishes that the respondent promptly abated the condition cited by immediately shutting down and repairing the defective handrail and posts in question. Although the inspector fixed the abatement time as the next morning, March 19, 1981, respondent voluntarily shut down at some cost and interruption to production to weld and secure the support posts and cable back into an upright position. I find that respondent exhibited rapid compliance and this fact has been considered by me in the assessment of a civil penalty for the violation which has been affirmed.

History of Prior Violations

Respondent's history of prior violations is reflected in petitioner's computer print-out, exhibit C-3. This print-out reflects three paid citations for the 24 month period preceding the ussuance of the citations in question. I find this to be a good safety record and have taken this into consideration in the assessment of the civil penalty.

Negligence

Mr. Mignot candidly admitted that the handrail post shown in exhibit C-2 was dislodged by a loader. Therefore, he knew of the condition cited, and his failure to exercise reasonable care to see to it that it was promptly repaired constitutes ordinary negligence.

Gravity

The elevated platform in question was some 8 1/2 feet off the ground. Although the dislodged post and cable handrail may have provided some protection to restrain someone from falling over the platform, the inspector stated that his measurement from the top of the cable at its lowest point as shown in exhibit C-2 was twelve inches. Mr. Mignot was not there at the time, and he could not rebut this fact. The inspector believed that someone could possibly trip or stumble and fall over this cable in the position which he found it. I accept this testimony, and find that the condition cited was serious.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Remain in Business.

I conclude and find that the respondent is a small-to-meduim size sand and gravel operator. Mr. Mignot stated that his business has fallen off since 1981 and that his production has been cut by 50% due to general economic industry conditions. Although he indicated that the payment of a civil penalty "will hurt", I cannot conclude that it will put him out of business or have an adverse impact on his ability to continue in business. However, I have taken his testiomny into account in the penalty assessment made by me in this case.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty assessment in the amount of $25 is appropriate and reasonable for the citation which has been affirmed.

Order

Respondent IS ORDERED to pay a civil penalty in the amount of $25 within thirty (30) days of the date of this decision for Citation No. 345580, March 18, 1981, 30 CFR 56.14-1, and upon receipt of payment by MSHA, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

E. W. Mignot, President, M & H Rock, Inc., 2660 Vine Street, Grants Pass, OR 97526 (Certified Mail)

Faye Von Wrangel, Esq., U.S. Department of Labor, Office of the Solicitor, 8003 F.O.B., Seattle, WA 98174 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 3 1982

CAMBRIA COAL COMPANY, : Contest of Citation
Contestant-Respondent :
: Docket No. PENN 81-145-R
v. : Citation/Order No. 1043746; 4/9/81
:
SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 81-204
Petitioner-Respondent : A.O. No. 36-02738-03008H
:
: Cambria Coal Strips and Tipple

DECISIONS

Appearances: Robert A. Cohen, Attorney, U.S. Department of Labor, Arlington, Virginia, for MSHA; Bruno A. Muscatello, Esquire, Butler, Pennsylvania, for Cambria Coal Company.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a citation and order issued by an MSHA inspector pursuant to sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, charging Cambria Coal Company with alleged violations of mandatory safety standards 30 CFR 77.404(a) and 77.405(b). The inspector also made a finding that the conditions or practices cited on the face of the citation constituted an imminent danger and that the alleged violations were significant and substantial. Docket No. PENN 81-145-R is the Contest filed by Cambria challenging the legality of the imminent danger and significant and substantial findings made by the inspector, and Docket PENN 81-204 is the civil penalty proposals filed by MSHA seeking penalty assessments for the alleged violations. The cases were consolidated for trial in Pittsburgh, Pennsylvania, on June 29, 1982, and the parties appeared and participated fully therein. Although given an opportunity to file post-hearings proposed findings and conclusions, the parties declined to do so. However, I have considered all of the arguments made by counsel on the record during the trial in the course of these decisions.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., particularly sections 104 and 107.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Issues

The issues presented in these proceedings includes the following: (1) whether the conditions or practices cited by the inspector on the face of the citation constituted a violation of the cited mandatory safety standards, (2) whether the violations were of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other safety or health hazard, and if such violations were caused by the unwarrantable failure of the operator to comply with the mandatory health or safety standard, (3) the appropriate civil penalty which should be assessed against the operator for the alleged violations based upon the criteria set forth in section 110 of the Act. Additional issues include the findings of "imminent danger" and "significant and substantial" made by the inspector.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. Cambria Coal Company and the mine in question are subject to the Act.

2. At the time the citation issued, the mine employed approximately 180 miners, mined approximately 3,000 tons of coal a day, and the mine constitutes "a fairly large strip mining operation."

3. The citation in question was issued by a duly authorized representative of the Secretary of Labor.

4. The imposition of a reasonable civil penalty will not adversely affect the respondent's ability to continue in business.

5. The respondent's history of prior violations at the mine in question was small, and during the preceding 24-months from the date of the issuance of the citation in question the mine was assessed for five violations, none of which involved the specific mandatory safety standard cited in this case (Tr. 19).

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The parties also stipulated as to the admissibility of their respective exhibits, and on motion by MSHA's counsel, the witnesses were sequestered.

Discussion

The citation issued by the inspector in this case, No. 1043746, April 9, 1981 (exhibit R-1), describes the condition or practice cited as follows:

> Terry Hamilton and Lewis Wagner, employees of this company, were doing maintenance work on a Drilltech drilling truck Ser. No. 1147303. This truck was suspended in air and not blocked in position (77.405(b)). This truck was being suspended by (3) hydraulic jacks mounted on this truck. The front hydraulic jack hose was partially removed to test this safety jack. This jack bled off when this hose was cracked indicating that it was not maintained in safe condition (77.404(a)).

MSHA's testimony and evidence

MSHA Inspector Leroy R. Neihenke, testified as to his mining experience and background, which included work as an electrician and mechanic, and he confirmed that he conducted an inspection at the mine on April 9, 1981, and that he observed a Drill Tech truck suspended in the air by hydraulic jacks near the train loadout building in the vicinity of the preparation plant (Tr. 23-27; exhibits C-1 and C-2). The truck was a model D40K heavy duty type consisting of three axles and ten tires, and it was equipped with one hydraulic jack on the front end and two jacks on the rear. The jacks are normally used to level the truck during drilling operations, and the jacks are operated by levers located inside the cab of the vehicle (Tr. 30).

Mr. Neihenke stated that when he observed the vehicle suspended in the air by means of the three hydraulic jacks no one was working on or in it. The front end of the truck was suspended approximately 12 inches off the ground, and the rear end was suspended approximately four inches and six inches off the ground at each jack location. He determined these distances by visual observation while standing approximately ten feet from the vehicle. He observed no blocking materials under the truck, and he indicated that solid wood crib blocks would normally be used to block the truck to keep it suspended in the air and to keep it absolutely stationary to prevent any movement (Tr. 30-31).

The inspector testified that a service vehicle was parked next to the drill truck in question and two employees were in it. The employees confirmed that they had performed work under the suspended truck previous to his arrival on the scene changing an oil filter and working on the hydraulic lines, but told him that they did not intend to continue the work. He estimated that the work already performed would have taken a half an hour, and he also confirmed that the employees were mechanics and that he observed oil on the ground near the front jack as well as under the truck. The inspector stated that the mechanics told him that they had been under the truck changing the oil filter, but that they did not have to be under the truck to change the oil. The inspector also indicated that even though the mechanics told him they were under the truck to change the filter, he did not believe they had to be under it since the filter can be changed from the top of the truck (Tr. 35-37).

The inspector stated that he issued the order because he believed the mechanics had been under the truck while it was suspended in the air, and that while they informed him they did not intend to go under it again he believed they would if he were "to walk away". He asked Terry Hamilton, one of the mechanics to check one of the hydraulic jacks to ascertain whether it would collapse if the fitting were cracked. Normally, the jack should remain extended after the fitting was cracked. When the fitting was cracked during the test, he observed oil coming out of it and the jack started to collapse. This indicated to him that the fitting pilot check valve was not functioning the way it was designed to (Tr. 40-42). The tested jack cylinder dropped for an approximate distance of two inches over a five minute period, and if it were functioning properly it would not collapse at all (Tr. 43). He believed that the malfunctioning pilot check valve could present a hazard to the men under the truck in that in the event a hydraulic hose or a fitting were to burst the jack could have collapsed, thereby causing serious or fatal injuries to the men under the vehicle (Tr. 44).

The inspector stated that company safety rules which were posted in the scale house required that equipment not be worked on until it was securely blocked, and in this case the safety rule was not followed (Tr. 44). He confirmed that the order he issued was the first imminent danger order he has issued in the five years he has been employed as an MSHA inspector (Tr. 48). He also indicated that the hydraulic jacks on the truck did not replace the requirement that the vehicle be blocked and that the purpose of the jacks was to level the truck during drilling (Tr. 52).

The inspector stated that after issuing the order, he returned to the mine on April 13, 1981, and the truck was in the same position as it was on April 9. The rear jacks were still suspended, but the front jack had collapsed and the front tires were on the ground. The jack was tested again and when it collapsed 1/8th of an inch he determined that it was still inoperative and he did not terminate the order. He returned to the mine again on April 16, but was told the truck would be repaired on April 21. He terminated the order on that day after testing the jack again (Tr. 59).

The inspector confirmed that he cited two standards in his order; one for failure to block the equipment, and the other for failing to properly maintain the mobile equipment (Tr. 59). He considered the condition he cited to be very serious, that an injury could have occurred immediately had the men crawled back under the truck, and he believed the respondent was negligent in that it is responsible for training its personnel as to the proper equipment blocking procedures. He also did not believe the respondent acted in good faith in abating the condition because of the time period which elapsed between April 9 until April 21, when repairs were actually made. He also considered the violation to be significant or substantial because it was reasonable to believe that any injury would be fatal, and that this was a reasonable likelihood (Tr. 59-62).

On cross-examination, Inspector Niehenke confirmed that he is familiar with jacks or similar equipment used on surface mining drilling trucks. He confirmed that he was familiar with a pilot operated check valve of the type used on the truck which he cited and indicated that it was a load locking device. He also indicated that the purpose of the jacks on the drill truck in question is to keep the truck level so that an accurate vertical hole can be drilled, and they are also used to keep the truck from overturning in the event the hole is not drilled correctly. If properly maintained, he believed the jacks would keep the truck in a stable position for a long period of time (Tr. 68-72).

The inspector testified that when he first observed the truck, the motor was not running and the two mechanics were sitting in their service truck parked ten feet away taking their lunch break. He confirmed that the truck has three leveling jacks, but others which are used to raise and lower the boom. He did not know whether the jacks were fully extended when he observed it, nor did he know how high the truck could be raised by fully extending the jacks (Tr. 74). He confirmed that the two mechanics admitted that they were working under the truck prior to his arrival on the scene changing the oil filter and a hose. He assumed they were working on a hydraulic oil hose because he observed a puddle of oil under the truck, but he could not determine whether the oil in fact came from the truck in question. Since the oil was directly under the truck pod, he assumed it came from the truck. He confirmed that the men told him that they did not intend to go back under the truck, and when asked why he found it necessary to issue an imminent danger order, he replied as follows (Tr. 78-79):

> Q. If the men did not intend to go back under the truck, what was the purpose of issuing the imminent danger order?
>
> A. I had the rest of my inspection to complete. I could not in fairness and good inspection procedure walk away from this condition, knowing that there was a real possibility that these men would crawl back under this vehicle.
>
> Q. Even after you told them not to, or did you not tell them not to go back under?

A. At that time, no, I did not tell them.

Q. Isn't it true that the whole problem could have been resolved just by having them lower the truck to the ground?

A. It is not my -- I am not to direct the work force. That is the operator's responsibility.

Q. Was there not a supervisor there?

A. At that time, no.

Q. I believe you indicated that whenever you first went to the area, that you had talked with a supervisor when you got there?

A. No, sir, that was in a different area.

Q. How far away was it?

A. A hundred yards.

Q. You could not walk 100 yards or send somebody over to get a supervisor to tell somebody to lower the jacks?

A. No.

Q. You are telling me that in your opinion, this was so dangerous that you would not tell a person to lower the jacks because it created a significant imminent immediate peril to the health, safety and welfare of these miners?

A. We did not direct the work force.

Q. I believe also in your testimony, you indicated that you assumed that they were going to crawl back under there. On what did you base that assumption?

A. That fact that they had been under the equipment to begin with. They stated they were under there. There was no blocking. It was reasonable for me to assume if I was to leave that area, it was reasonable for me to assume that these men, because they had done it in the past, they would do it again.

The inspector indicated that he had one of the mechanics "crack" one of the front hydraulic jack fittings, but not the back ones. He did so because he was only concerned with the front jack at that time, and his concern stemmed from the oil which he observed on the ground, and he assumed that something was wrong with the jack because of the presence of the oil on the ground and the fact that the jack itself was covered with oil (Tr. 81-82). His recollection was that it was the left hydraulic hose fitting going into the top of the jack (Tr. 83). He observed oil coming from the fitting under some pressure for about four or five minutes. He did not mark the extension of the jack prior to having the fitting cracked, nor did he measure how high the jack was positioned prior to the cracking of the fitting. However, he indicated that the truck dropped approximately two inches in a period of five minutes after the fitting was cracked, and that this drop was slow. He determined the drop distance by observing the distance between the truck tire and the ground as the truck was slowly dropping (Tr. 85). The rear jacks were not affected since they act independently from the front one. He did not observe the truck for more than five minutes because "it was reasonable to expect that if it fell this distance if five minutes, that if a man was under the vehicle, he could be crushed in that distance" (Tr. 86).

The inspector indicated that his concern was the pinch point from the axle to the carriage of the truck or from the ground to the truck axle. If someone were to be caught at either point, serious or fatal injuries could result. He indicated that the distance between the truck axle and ground was "fairly high" and that a man should be able to crawl under the truck without elevating it. He conceded that while he never observed the distance between the truck axle and carriage, he nonetheless felt that this was a possible pinch point where someone could get stuck in but that he did not know for sure. He also believed that the area between the axle, carriage or ground could be another pinch point and that if someone were to slide under the axle sideways "maybe the axle could come down and crush him that way" (Tr. 88). He also stated that his concern was over the slow gradual drop of the truck rather than a complete or sudden drop (Tr. 89).

The inspector stated that he did not consider the use of the truck jacks as adequate blocking of the vehicle, regardless of the safety features on the truck, and that his opinion in this regard is based on his training and experience. With regard to the citation concerning the failure to maintain the truck in a safe operating condition, he stated that he cited this standard because of his concern for the condition of the front jack, and that he did not inspect the truck itself to determine actual internal working conditions and only concentrated on the jack (Tr. 91). He conceded that the pilot check valve spring operates under pressure generated hydraulically by the truck motor and with the motor off there would be no such pressure (Tr. 96).

The inspector denied that he ever stated to anyone that he would not have issued the imminent danger had Mine Superintendent Morrison come to the scene when he called for him, but he admitted that he was upset because Mr. Morrison could not get there right away and he was upset because Mr. Morrison "had something more important to do than to worry about his personnel" (Tr. 97). The inspector also indicated that safety regulations prohibiting work on elevated vehicles unless they were securely posted were in fact posted on the bulleting board (Tr. 99).

The inspector did not believe that the respondent exercised good faith in the abatement of the violations because of the amount of time it took to take corrective action. He indicated that he had no way of knowing that the truck was needed, and the failure to timely repair it constituted a hazard as far as he was concerned (Tr. 100). He also indicated that he was concerned over the fact that he had to go back to the mine two or three times to abate the violation (Tr. 102).

In response to questions from the bench concerning his rationale in issuing an imminent danger order, the inspector states as follows (Tr. 103-105):

> Q. Am I to assume that had you observed this truck out by the pit drilling area rather than in a raised position stationary with two fellows by it, that we probably wouldn't have this case, would we, if you were driving by this truck and you saw it drilling out there, nothing would have come to your attention, would it?
>
> A. No. It would have been a normal situation for me to see this vehicle suspended in the air with these jacks while they were drilling. There wouldn't have been anything abnormal to it unless I would have happened to check this valve, which I more than likely would have done.
>
> Q. So what called this particular situation to your attention was the fact that you saw it raised and you saw some indication of oil and you thought that some fellows had been working on it?
>
> A. They stated that they had been working on it, yes.
>
> Q. Let me ask you this question. At the time that you observed the vehicle, the time that you talked to the two employees, and then you spoke to one of the foremen there, you spoke to someone, you talked to Mr. Morrison on the phone. What if someone in management, mine management, had made the decision to lower the truck, in other words, put it down full flush to the ground, would that have abated the condition?

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A. To me, it would have relieved the imminency of the condition, but I would have still issued a citation.

Q. Some kind of citation with a reasonable time to take care of the hydraulic problem, is that the idea?

A. Yes.

Q. Let's assume that the one hydraulic jack was not leaking and that it had tested and that the condition was okay. You still would have come to the conclusion that this being suspended on the jack was still an imminent danger?

A. Yes, I would.

Q. Even though all three jacks were in proper working conditions?

A. Yes.

Donald L. Liberatori, employed as a journeyman mechanic with the Beckwith machinery company, Clearfield, Pennsylvania, testified that his duties include the making of field repairs on caterpillar and Drill Tech equipment, and he stated that his experience also includes work on the Drill Tech Truck hydraulic jacking system over a period of five or six years. He also indicated that on several occasions he worked on various hydraulic problems on the trucks similar to the one cited in this case, and he checked the front jack on the very truck itself (Tr. 117-120).

Mr. Liberatori stated that the jack in question has a safety pilot check valve and he explained how it operates. In order to make the jack go up or down the engine must be running and hydraulic pressure between 1200 and 1500 pounds must be present to overcome the check valves. When the engine is not running, there is only 100 pounds of air pressure and the jack mechanism will not operate, and this would be true even if someone inadvertently activated the controls. Further, each jack cylinder has two pilot operated check valves and they must be unseated by hydraulic pressure (Tr. 121-123). He identified a sketch of one of the leveling jacks and explained the operation of the jack cylinder and how the jack is extended (Exhibits C-5, C-3, Tr. 123-128).

Mr. Liberatori testified that if the hose to the jack in question were "cracked" or disconnected oil under pressure would be released from the inside of the jack cylinder, but this would not indicate that the machine was malfunctioning because oil was coming out (Tr. 130). He stated that he was called to the mine on April 9, 1981, to inspect the truck jack in question and that he made certain tests and filled out a service report. He measured the position of the jack with and without hoses. He marked the jack and measured the drop or "drift" distances

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with a ruler. At 3:14 p.m. the jack cylinder was extended out to a distance of 39 and 5/8 inches. At 3:18 p.m. it had dropped to 39 1/4 inches, and it dropped or "drifted" less than one inch in twelve minutes. At 3:31 p.m. both hoses were removed from the jack, and 38 inches of the cylinder was exposed, which indicated a drop of 1 5/8 inches with both hoses off over a period of 30 minutes. In his opinion, it was not unusual for such a machine to drift this distance, and after a further drift of another fraction of an inch it would stop (Tr. 129-134).

Mr. Liberatori stated that the truck jacks are designed so that they not drift or drop more than the distances which he has indicated because the drill holes have to be perfect or the machine "will teeter and it could upset" (Tr. 134). When asked whether the jacks are designed to hold a piece of elevated equipment stationary, he replied "it's the same thing, it's all part of the design of it" (Tr. 135). He also expressed an opinion that the jack in question was in proper working condition, and he explained the presence of any oil as normal and that it was not coming from the leveling jack (Tr. 137).

Mr. Liberatori stated that he has been under Drill Tech trucks "a lot of times", and has worked under the truck with the jacks as the sole support because "there is a lot of jobs that that's the only way I can get at it." He explained that depending on the terrain, there is 12 to 14 inches of clearance under the axle, and there is room to crawl through. He also indicated that the truck has huge springs, weighs over 79,000 pounds, and has big steel blocks which limits its travel (Tr. 138). He also indicated that there is 8 to 10 inches of clearance between the truck axle and carriage and that the area would not compress more than an inch because it would hit the steel blocks. In order for the truck to drop completely there would have to be complete pilot valve failure, but that this drop would probably take 10 to 12 seconds, which he believes would be reasonable time for anyone to get out from under the machine (Tr. 140).

Mr. Liberatori stated that with the jacks on the truck fully extended, the truck would be securely blocked because that is the way the system is designed. He could not say the same for loaders or bulldozers because they do not have safety jacks designed to support them (Tr. 142).

On cross-examination, Mr. Liberatori stated that his tests on the cited cylinder was made over a couple of hours duration, that the cylinder hoses were taken completely off, and that the jacks protrude far enough from the truck so that there was no need to crawl under the truck to check the jack (Tr. 146-147). He indicated that he was familiar with the truck operations manual and indicated that it says nothing about blocking out the vehicle before it is repaired (Tr. 151). He indicated that he would not block the truck in question to work on it if it were parked where it was on the day the citation issued, but if it were on an incline he would put it in gear and block it (Tr. 152). Blocking would give one an extra margin of safety to prevent it from falling or rolling (Tr. 153).

Mr. Liberatori confirmed that the truck cylinder in question was not leaking oil and that if it were it would drop faster than it did during his test, and it would eventually jam itself (Tr. 157). He explained the presence of oil on the outside of the jack as a possible leaky seal or "o" ring, which could possibly cause a drop of a distance of 1 1/2 inches (Tr. 159-160). He also indicated that there is almost no possibility of the jacks in question completely failing, but he conceded that he did not perform routine maintenance on the jack in question (Tr. 161). He also conceded that if the jacks failed completely and the truck dropped two inches there is a danger of the truck rolling, upsetting or toppling over if it were in the process of drilling and this would present a hazard since the jacks are not fail-safe (Tr. 164, 166).

Mr. Liberatori stated that performing maintenance on the truck, such as greasing the universals or changing the tires would require it to be elevated, and he would feel completely confident doing this work with the truck elevated by means of the three jacks and with no blocking (Tr. 168).

Ralph E. Morrison, respondent's General Mine Superintendent testified that on April 9, 1981, he was at the mine with the safety crew conducting a monthly inspection of the machines at every job site, and he was approximately 8 miles from the site of the drill truck which was cited. The mechanic and the inspector called him over the radio. The inspector informed him that the truck had no blocking and was unsafe and wanted him to come to the scene right away. Mr. Morrison advised the inspector that he would come as soon as possible, and he eventually arrived at the scene some 20 minutes or a half hour later (Tr. 170-173).

Mr. Morrison testified that he discussed the situation with the inspector, and pointed out to him that the jack rod which he believed was leaking was actually inside the jack tube or sheathing and that what he observed was the outside of the tube. The inspector told him that if he had gotten there sooner he would not have issued the order. The inspector advised him that the jack was unsafe because it was leaking, and the mechanic took a jack hose off to see whether the jack would drop. It dropped about an inch or so and the hose was then reattached. The inspector advised him that he wanted the jack removed and repaired, and Mr. Morrison advised him that he probably fix it but wanted to check it first and that the truck would not be moved from the site (Tr. 175).

Mr. Morrison stated that after the inspector left the site, one of his mechanics removed the hoses and oil came out of the hoses but the drill "sat there". There was no internal leak of any oil coming down the jack rod. The Beckwith Company was then called to in to check the jack and he observed Mr. Liberatori conduct his tests and he concurred with his testimony concerning the test results (Tr. 176-177).

Mr. Morrison stated that the inspector was called back to the mine on Monday, April 13, 1981, and was told that there were leaks from the jack rod. The inspector believed it was scored, and before spending $2000 to repair the jack Mr. Morrison wanted to make sure it was defective (Tr. 177). Mr. Morrison also indicated that the jack moved no more on Monday than it did the day the citation issued on the previously Friday. The inspector insisted that the jack leaked and indicated that he wouldn't remove the order until it was fixed (Tr. 179).

Mr. Morrison stated that the drill truck in question had not been used since it was cited, and that contract drillers have been used since that time (Tr. 181). He also indicated that on May 14, 1982, the Inspector came to the mine and asked to see the truck so that he could look at the checkpoints and valves (Tr. 179). Mr. Morrison believed that the inspector issued his order because he (Morrison) did not go to the scene promptly (Tr. 182-183).

On cross-examination, Mr. Morrison confirmed that subsequent to the issuance of the citation the jack in question was broken down and taken apart by Stockdale Mine and they found nothing wrong with it. He identified photographic exhibit C-6 as the jack after it was returned by Stockdale. Mr. Morrison could not recall telling the inspector that the jack haa a defective o-ring (Tr. 185).

Mr. Morrison stated that the work performed on the truck when it was cited entailed the replacement of hoses from the truck engine to an oil lubrifiner located near the front tire. The mechanics were there only to put a hose on the enginer, and this work took "probably 20 minutes" (Tr. 187). He also confirmed that company policy required that vehicles be blocked out when work is performed under them, but that the Drill Tech trucks have never been blocked. He also confirmed that the imminent danger order on the truck was the first such order issued at the mine and that it caused him some concern (Tr. 187-188).

Mr. Morrison confirmed that when the inspector returned to the site on Monday, April 13, the two back wheels were still suspended and the tires were off the ground. However, the front jack had collapsed and the tire was on the ground. This would indicate that someone either let the front jack down or it collapsed by leaking down. Assuming it leaked down 12 inches, then he conceded that there would be something wrong with it in that it had a leak (Tr. 192-193).

Terry Hamilton, mechanic, testified that he operated the drill truck in question for four years, and for the past three years has performed maintenance on it in his capacity as a mechanic. He confirmed that at the time the inspector arrived at the scene he and Mr. Lewis Wagner had just completed changing an engine oil hose. The inspector asked him whether or not the front jack would drop if the hose broke loose, and when he disconnected the hose at the inspector's request, oil came out of the hose and the jack dropped approximately 1/2 inch. Mr. Morrison was summoned to the scene and when he arrived the hoses were taken completely off and little oil came off and the jack did not move.

Mr. Hamilton denied that the inspector asked him whether he had worked under the truck. However, he admitted that he had worked under the truck and had his tools there, but that he did not believe it was dangerous. He also conceded that when he performs maintenance on the truck in question he never blocked it because he believed the truck jacks are adequate for this purpose.

On cross-examination, Mr. Hamilton confirmed that when he repaired the enging oil hose he was under the truck, but that it was not jacked up at that time. He jacked it up so that the hose could be passed over the front wheel fender area. He also confirmed that when he cracked the jack hose to test the hydraulic system he was standing on the front fender and was in no position to observe any movement of the truck. He indicated that he had heard that an "o" ring on one of the jack valves was defective (Tr. 194-212).

Louis Wagner, testified that at the time the order issued he was working as a driller on the truck which was cited. At the time, he was helping Terry Hamilton repair an oil line which had been damaged the day before. The truck was on the ground at one time during the repairs, but was subsequently jacked up to facilitate the installation of some clamps.

Mr. Wagner stated that the hydraulic jacks on the truck have several safety features which prevent the truck from falling. The inspector asked him to "break the hose" on the front hydraulic to ascertain whether the truck would fall, and when he disconnected the jack hose, the jack dropped approximately 1/4 to 1/2 inch. He did not measure the distance, but simply relied on his experience to estimate the distance.

Mr. Wagner stated that he had worked with the truck on many occasions drilling holes, and he estimated that he drilled approximately 30 holes on any given shift and had no problems with the jacks functioning properly. He believed the front jack on the truck which was cited was in a good and safe operating condition at the time the order was issued.

Mr. Wagner stated that at the time the order issued, he could recall no oil or hydraulic fluid present on the front jack, and if it were there, it must have come from the "mast" and not from the hydraulic jack cylinder. He denied that he told the inspector that he had been working under the truck.

On cross-examination, Mr. Wagner confirmed that he never worked under the truck, but that Mr. Hamilton was under it at the time he was repairing the engine oil hose. All repairs were completed at the time the inspector arrived at the scene, and in view of the fact that he and Mr. Hamilton were on a "break" the truck was left in a raised position. He confirmed that the inspector asked him why the truck had not been blocked and that he (Wagner) told the inspector that it had been "on the jacks".

Mr. Wagner stated that he believed the front truck jack was in good condition. He also confirmed that he had heard that an "o" ring on the jack had been found to be defective when it was dismantled by a maintenance contractor (Tr. 227-242).

John McElheny, truck mechanic, testified that on April 9, 1981, he was asked to disconnect the hydraulic hose line to the front hydraulic jack on the Drill Tech truck in question. Present were Mr. Morrison, Mr. Wagner, and the inspector. When he disconnected the line, the pressure was bled off, oil came out of the hose, but he could not detect any movement in the truck. He had never previously performed any maintenance on the truck except for working on the directional turn signals, but this did not require his crawling under the truck.

Mr. McElheny stated that he was at the truck area approximately 15 to 20 minutes while testing it and he saw nothing wrong with the jack in question.

On cross-examination, Mr. McElheny stated that because of his position on top of the truck at the time the testing was conducted, he was in no position to observe any movement of the truck when the jack hose line was disconnected. He could not recall observing any hydraulic oil on the ground under the truck, and while he may have observed some oil on the hydraulic cylinder, he did recall whether it was present on the hose (Tr. 247-262).

Gary L. Maney, General Manager, testified that on May 14, 1982, he spoke with the inspector concerning the order and citation in question. The inspector had come to the mine for the purpose of gathering additional evidence in preparation for the hearing, and wanted to test the drill truck in question. However, the machine was not operable at the time. Mr. Manay stated that during his conversation with the inspector he stated to Mr. Maney that had Mr. Morrison shown up when he called him he probably would not have issued the imminent danger order. Mr. Maney also indicated that he had no personal knowledge concerning the condition of the truck in question (Tr. 270-275).

Mr. Morrison was recalled, and he testified that the jack in question was taken off the truck and replaced, and he indicated that the company did this because the inspector thought it was defective. An exchange cylinder was placed on the truck and inspector Niehenke was called back to the mine to abate the citation. Mr. Morrison indicated that the company still has the parts from the jack that was taken off, and to his knowledge the jack was not defective. However, in response to a question as to whether the jack cylinder may have had a defective "O" ring, as referred to in the inspector's notes, Mr. Morrison stated that he could not recall telling the inspector that the jack may have had a cracked "O" ring after it was dismantled by the repair company which gave them a replacement (Tr. 278-285).

Mr. Liberatori was recalled and he confirmed that repair companies often replace jacks by simply giving the company a replacement and taking the old one for repairs (Tr. 289). When asked an opinion as to whether the jack dropping an inch and five-eighths within 30 minutes was unusual, Mr. Libaratori stated "it's workable" and "you could live with it" (Tr. 290). He also indicated that "it was very near normal" (Tr. 291).

Inspector Niehenke was recalled, and was questioned about his citation concerning the allegation that the front jack of the truck was not being maintained in a safe condition. He stated that he based his conclusion that this was so on the oil or hydraulic fluid that he observed on the outside of the jack and on the ground. He indicated that there was "a continual path of oil from the side of the jack to the pad on the ground" (Tr. 294). He confirmed that oil came out when the jack hose was partially removed to test it, but he conceded that he did not know where the oil was coming from and assumed that it was from the jack (Tr. 295).

The inspector identified exhibit 4-B as the jack hose in question and confirmed that the hose was on the outside of the jack housing. He also indicated that a drop of two inches when the hose was cracked is not normal, and that if the safety valve were operative it should not have dropped at all (Tr. 296). Since it did drop, he concluded that it was not maintained in a safe condition (Tr. 297).

Findings and Conclusions

As indicated earlier, the inspector issued one citation in this case citing conditions or practices which he believed violated mandatory safety standards 30 CFR 77.405(b) and 77.404(a). He concluded that the failure to block the truck which was suspended in the air by means of three hydraulic jacks which were an integral part of the truck constituted a violation of section 77.405(b). After testing the front jack and finding that it "bled off", he also concluded that the truck was not being maintained in a safe condition, and that the failure to remove it from service constituted a violation of section 77.404(a).

In addition to his charges of violations of the aforementioned cited mandatory safety standards, the inspector also found that the conditions and practices cited on the face of the citation also constituted an imminent danger pursuant to section 107(a) of the Act, and that the violations were "significant and substantial" ones.

Mandatory safety standard 30 CFR 77.404(a), provides as follows:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

Mandatory safety standard 30 CFR 77.405(b), provides as follows.

> No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

Fact of Violation - 30 CFR 77.404(a)

Section 77.404(a) requires that equipment be maintained in a safe operating condition and that any such equipment which is unsafe is required to be removed from service immediately. On the facts of this case, I conclude and find that MSHA has failed to establish through any credible evidence that the drill truck was not in safe operating condition because of the purported defective front hydraulic jack. At the time the inspector looked at the truck, it was not in operation, the engine was not running, and at the time the mechanic performed the so called test by cracking the hydraulic hose valve, the engine was not started and there was no power to the truck hydraulic system. Further, the inspector conceded that he had no way of telling precisely what the problem was since he "could not see into the internal parts to that hydraulic jack" (Tr. 47). He also conceded that he assumed that the oil he observed running down the outside of the jack came from the jack itself and not from any other source (Tr. 296). He insisted that a properly operating pilot safety valve would not have caused the jack to drop at all even if it were cracked or bled off as it was during the test. When it did, he concluded that the jack was not being maintained in a safe operating condition (Tr. 297).

There is nothing in the record to suggest that the inspector had any reason to suspect tnat the front hydraulic jack in question was defective prior to the time the mechanic loosened the pilot check valve fitting. The truck caught the inspector's attention because it was elevated and not blocked, and that was his principle concern. His concern was that with the truck wheels on the ground, a two-inch drop in the front hydraulic jack would result in crushing injuries in the event a man were under it and had his head between the truck frame and the axle (Tr. 55). However, in this case the inspector stated that after the test was conducted on the front hydraulic jack, he decided to immediately issue his imminent danger withdrawal order. Under these circumstances, the effect of that action immediately caused the truck to be taken out of service. Although this was not done by the operator, the result is the same.

Inspector Niehenke believed that the truck was not being maintained in a safe operating condition because the front hydraulic jack dropped approximately two inches in five minutes when the hydraulic hose fitting was "cracked" or "bled off" when loosened with a wrench. Mr. Niehenke asked a mechanic to crack the fitting in order to determine whether a pilot check valve was functioning properly. When the fitting was cracked, the inspector observed hydraulic oil coming from the fitting, and he concluded that pilot valve was defective. In his opinion, a properly operating valve would not permit any oil to come out of the fitting, even when cracked or tested. He also believed that a properly operating pilot valve would not have permitted the front jack to drop two inches when cracked or tested, and stated that the purpose of the check valve was to keep the hydraulic cylinder extended even if there was a loss in hydraulic pressure due to a broken hose or fitting.

The drill truck in question is a large, three axle machine with ten tires, and the purpose of the hydraulic jacks is to keep the truck level during the drilling of vertical holes. The truck is normally used to drill holes while blasting overburden, and as indicated earlier, the function of the three hydraulic jacks is to stablize the drill rig during the drilling process. During the drilling process the jacks and drill are operated by levers by the drill truck operator, and there is nothing to suggest that anyone has to crawl under the machine while it is in its normal drilling position. Therefore, it seems clear to me that at the time the inspector observed the truck in its elevated position it was not located where it would normally be while drilling. As a matter of fact, the truck was near the preparation plant and some maintenance was being performed on it by two mechanics who had their equipment in a pick-up truck parked nearby. Further, there is no evidence that the two rear hydraulic jacks were defective or unsafe. As a matter of fact the inspector stated that he did not ask the mechanic to crack the valves on the rear jacks since he was only concerned with the front one since he observed oil on the outside of the jack. Although he also alluded to some oil on the ground, he could not tell whether it came from the truck hydraulic jack, and since the mechanics had just completed changing oil filters on the truck it is possible that this was the source of that ground oil.

Respondent's witness Liberatori, a journeyman mechanic whose experience included maintenance work in Drill Tech Truck hydraulic systems, testified that each hydraulic jack cylinder has two safety pilot check valves, and he stated that in order to make the jacks go up or down the truck engine must be running so that the hydraulic pressure is built up to a point to overcome the check valves. With the engine off, he indicated that there is only 100 pounds of air pressure and that the jack mechanism will not work. He also indicated that the jack pilot valves can only be unseated by hydraulic pressure, and that if one of the jacks is "cracked" or disconnected oil pressure would be released from inside the jack cylinder, but that simply because this oil is released in these circumstances does not indicate that the jack is defective. He explained the presence of any oil on the outside of the jack as a possible leaky seal or ring, and he conceded that a total failure of the jack during the drilling process could present a hazard.

On the basis of all of the evidence and testimony adduced in this case, I cannot conclude that MSHA has established by a preponderance of any credible evidence that the alleged defective pilot check valve on the front hydraulic jack in question was defective or unsafe. On the facts presented in this case, it seems clear to me that the inspector conducted a rather cursory and superficial examination of the jack in question. I believe that he decided to issue his withdrawal order when he found that the two mechanics had been under the suspended truck without blocking it, and that the "testing" of the jack in question was done in an attempt to justify his order. I venture a guess that had the truck not been suspended in the air, neither the inspector nor the operator would have any reason to crack ot test the front jack pilot valve, thereby releasing the oil and causing the jack to slowly drop for a distance of two inches. In short, I cannot conclude that this drop of two inches, which I believe was the result of the cracking or lossening of the valve, was in fact a safety defect affecting the safe operation of that truck while in use during the drilling of overburden.

In view of the foregoing findings and conclusions, I conclude and find that MSHA has failed to establish a violation of section 77.405(a), and that portion of the citation which alleges such a violation IS VACATED.

Fact of violation - 30 CFR 77.405(b)

Section 77.405(b) requires that raised machinery or equipment be securely blocked in position before any work is performed under it. It seems clear to me from the arguments made on the record in this case that Cambria's position is that the drill truck in question was securely blocked in position by means of the three hydraulic jacks which are an integral part of the machine (Tr. 18). On the other hand, it seems equally clear to me that MSHA's position is that the three hydraulic jacks in question are not a suitable substitute for the requirements that the machine be independently blocked by means other than the truck jacks.

Apart from the testimony presented by Cambria's witnesses with respect to the use of the truck jacks to stablize the truck while it was being worked on by the two mechanics, Cambria relies on a "policy guideline" found in MSHA's "Inspector's Manual", Exhibit R-5, which states as follows:

> Mechanical means that are manufactured as an integral part of the machine for the purpose of securing a portion of the machine in a raised position is acceptable as meeting the requirements of this section.

MSHA's position with regard to the so-called "policy guideline" is that it is inapplicable to the facts presented in this case, and that other "information bulletins" and "interpretative memorandums" make it clear that raised equipment such as the truck which was been cited, must be blocked by independent means and blocking materials other than the jacks in question. After careful consideration of the arguments presented, I conclude and find that MSHA has the better part of the argument and that the three jacks which are an integral part of the drill truck in question may not be used as a "suitable substitute" for the blocking requirements of section 77.404(b), and my reasons for this finding follow below.

It seems clear to me from the photographs of the truck in question, exhibits C-1 through C-4, C-8, and R-4 (a) through R-4 (d), as well as the testimony adduced in this case, that the purpose of the three truck jacks is to stabilize the truck and maintain it in a level position while actually drilling holes during the blasting of overburden. Keeping the truck level and secure insures an accurate drill hole and prevents a drill from deviating from its intended course and possibly tipping the truck over. However, once the truck is removed from the drilling site for the purpose of performing maintenance, as was the case here, I cannot conclude that the hydraulic jacks, even if they were functioning properly, could ever insure against a forward or backward movement of the truck while in an elevated position. The language of the standard is specific on this point. It requires blocking, and as I understand that term the intent and meaning of the standard is that some independent means of blocking be used to insure against movement of the equipment while maintenance is performed on it. As correctly stated by MSHA's counsel during the course of oral arguments during the hearing, "blocking means blocking."

It is clear from the evidence and testimony adduced in this case that the truck in question was raised and that it was not blocked against movement by blocking materials independent of the hydraulic jacks. Respondent's own witness, mechanic Liberatori, conceded that blocking would provide an extra margin of safety to prevent the machine from falling or rolling, and I reject his suggestion that this would not be the case if the truck were elevated on level ground as it apparently was in this case. Under the circumstances, that portion of the citation charging a violation of section 77.405(b), IS AFFIRMED.

The alleged imminent danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 820(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," *Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969* at page 44 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, *naturally or otherwise caused*, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added]

And, at page 89 of the *report*:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered ***. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. *Eastern Associated Coal Corp.* v. *Interior Board of Mine Operations Appeals, et al.*, 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. *Freeman Coal Mining Corporation*, 2 IBMA 197, 212 (1973), *aff'd.*, *Freeman Coal Mining Company* v. *Interior Board of Mine Operations Appeals, et al.*, 504 F.2d 741 (9th Cir. 1974). The foregoing principles were reaffirmed in *Old Ben Coal Corporation* v. *Interior Board of Mine Operations Appeals, et al.*, 523 F.2d 25 (7th Cir. 1975), where the court, following *Freeman*, phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate

> an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7 (d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322, 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the front jack on the truck which was cited constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Likewise, MSHA must also show that the lack of suitable blocking at the time the order issued also presented such an imminently dangerous situation.

After careful consideration of all of the testimony and evidence adduced in this case, I cannot conclude that the conditions described by the inspector in his citation constituted an imminent danger on April 9, 1981. At the time the inspector observed the elevated truck no one was working under it and the two mechanics who were present were at a safe distance eating their lunch in a service truck parked nearby. After observing the elevated truck, interviewing the two mechanics and learning that they had been under the truck performing some maintenance work shortly before his arrival on the scene, the inspector proceeded to examine the front jack and he instructed one of the mechanics to loosen or bleed off the front pilot check valve with a wrench. It seems to me that if the inspector was really concerned about the imminency of the situation, he should have instructed the mechanic to lower the jacks so that all of the wheels were safely on the ground before approaching the truck to conduct the so-called test. His statement that he could not do so because he "does not direct the work force" is inconsistent since he specifically instructed and directed the mechanic to loosen the pilot valve to perform the test. Since the inspector obviously believed that instructing the mechanic to perform this chore was within his authority, I fail to understand why he may have believed that instructing him to lower the jacks somehow exceeded that authority. In my view, the lowering of the jacks would have eliminated any perceived hazard, and permitting the mechanic to go ahead and approach the truck and perform the test adds to the doubts which I have concerning the presence of any imminent danger at the time the order issued.

Although he denied telling anyone that he would not have issued an imminent danger order had mine superintendent Morrison come to the scene immediately when he called him over the mine telephone, the inspector did concede that he was upset over Mr. Morrison's failure to come immediately. Having viewed the inspector during his testimony that Mr. Morrison "had something more important to do than to worry about his personnel", I believe that the inspector was somewhat chagrined by Mr. Morrison's failure to come to the scene immediately, and that this did influence the inspector's judgment somewhat in deciding to issue the order.

The inspector's asserted justification for issuing an imminent danger order was his belief that once he left the scene the two mechanics would have gone back under the truck. On the facts presented here, I find nothing to substantiate the inspector's speculative conclusion that the two men would defy his instructions. One of the two "mechanics" who purportedly were under the truck prior to the inspector's arrival at the scene was in fact a driller (Louis Wagner) who was helping the mechanic. Mr. Wagner testified that he was not under the truck, and he denied telling the inspector that he had been under the truck. He also testified that at the time of the inspector's arrival all of the work on the truck had been completed. The inspector conceded that an oil filter could be changed from the top of the truck without the necessity of anyone going under it. Further, the facts here also show that the two rear jacks were in proper working order. Coupled with my finding that the two inch drop in the

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front jack was caused by the deliberate loosening of the fitting during the so-called "test", I cannot conclude that the condition of the front jack was such as to constitute an imminent danger. In addition, I cannot conclude that the absence of blocking presented any imminent danger on the facts here presented. Under the circumstances, that portion of the citation which alleges an imminent danger IS VACATED, but my findings concerning the existence of a violation of section 77.405(b) stand as affirmed.

Significant and Substantial

In Secretary of Labor v. Cement Division, National Gypsum Company 3 FMSHRC 822, issued on April 7, 1981, the Commission interpreted section 104(d) and set forth the test for determining whether a condition created by a particular violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard. The National Gypsum case was a civil penalty proceeding concerning eleven section 104(a) citations in which the inspectors marked the "S & S" block on the face of each citation. In that case the Commission held that a violation is "significant and substantial" if --

> based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

On the facts presented in this case, the inspector marked the "S and S" block on the face of the citation form, and at the same time he made a finding that an imminent danger existed. However, I find nothing in section 104(a) or 107(a) that specifically authorizes an inspector to also make an "S & S" finding when he issues such citations or orders. The only specific mention of any "significant or substantial" violation is found in section 104(d)(1) and section 104(e)(1). The former section deals with "unwarrantable failure" citations, and the latter deals with "patterns of violations" which are considered to be significant and substantial. Under section 104(d)(1), a condition precedent to a finding of "significant and substantial" is that no imminent danger exists. Therefore, on the facts of this case, the inspector's findings that the conditions or practices cited constituted an imminent danger as well as significant and substantial violations is somewhat inconsistent.

In the instant case, it seems obvious to me that the inspector believed that the failure to independently block the truck while performing maintenance on it while in an elevated position constituted a significant and substantial violation of section 77.405(b). Although it may be true that the hydraulic truck jacks provide some measure of support for the truck while it is the actual drilling mode, I am convinced that the primary purpose of those jacks is to stablize and level the truck during the drilling process so as to insure an accurate drill hole. In this case, the truck was not engaged in any drilling, but was parked away from the drill site while maintenance was being performed on it. The practice of

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not using any independent means of blocking under the truck to preclude any forward or backward movement while someone may be under it is a serious practice which, under the proper set of circumstances, could result in serious injuries to those individuals. The question here is whether those circumstances were present. While it can be argued that at the time the citation issued, the work on the truck had been completed and no one was under it, the respondent's candid admission in this case that the Drill-Tech Trucks were never blocked is a practice which I consider to be a significant and substantial violation. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Remain in Business

The parties stipulated that the mine is a fairly large operation and that the assessment of reasonable penalties will not adversely affect the respondent's ability to remain in business. I adopt these stipulations as my findings on these issues.

History of Prior Violations

The parties stipulated that the respondent has a small history of prior violations. In fact, they also stipulated that for the 24-month period prior to the issuance of the instant citations, the respondent had five paid assessments, none of which were for violations of the same safety standards at issue in these proceedings. Taking into account the size of the mining operation here, I conclude and find that for the purpose of this proceeding Cambria Coal has a good safety record and that any additional increase of the civil penalty assessment made in this case is not warranted.

Negligence

The evidence here establishes that the notice of mine policy against working under elevated equipment without adequate blocking was posted on the mine bulletin board, and one of the mechanics admitted he had been under the truck in question without any independent means of blocking. Under the circumstances, I conclude that the respondent here failed to take reasonable care to prevent the cited conditions and that this constitutes ordinary negligence.

Gravity

I conclude and find that the failure to provide an independent means of blocking for the elevated truck in question constituted a serious violation. The respondent conceded that it did not use independent blocking under such drill trucks because of its belief that the hydraulic jacks which are an integral part of the equipment provided adequate support. Although respondent may have acted out of a mistaken belief that MSHA's policy guidelines provided an exception for the requirement for independent blocking, I find that the practice of relying on the truck hydraulic jacks alone while performing maintenance on the truck is serious.

Good Faith Compliance

The inspector believed that the respondent exhibited bad faith in correcting the cited conditions and his conclusions in this regard stem from the fact that he had to make several trips back to the mine before he finally abated the order. On one occasion when he went back and found that the front jack still dropped an eighth of an inch when tested, he refused to abate the order and was compelled to return again. However, the facts show that the jack was dismantled and completely replaced with a new one. This was apparently done after the operator opted to leave the truck where the inspector found it, and there is no evidence that the operator used it after it was cited. Simply because the inspector was required to make several trips back to the mine to abate the citation is no reason to conclude that there was bad faith. Here, the effect of the withdrawal order was to remove the truck from service and no abatement time was fixed by the inspector. The abatement time was therefore up to the operator's discretion, and the fact that the inspector may have been inconvenienced is not sufficient grounds for me to conclude that the operator here exhibited a lack of good faith in finally correcting the cited conditions. Accordingly, I cannot conclude that there was a lack of good faith compliance in this case.

Penalty Assessment

In view of the foregoing findings and conclusions, and taking into account all of the statutory criteria found in section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $400 is reasonable and appropriate for the violation which has been affirmed, namely 30 CFR 77.405(b).

Order

Respondent IS ORDERED to pay a civil penalty assessment in the amount of $400 within thirty (30) days of the date of this decision for the violation in question, and upon receipt of payment by MSHA, the civil penalty matter should be DISMISSED.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

Robert A. Cohen, Esq., U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Bruno A. Muscatello, Esq., Brydon, Stepanian & Muscatello, 228 South Main St., Butler, PA 16001 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 8 1982

RANGER FUEL CORPORATION,
Contestant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

CONTEST OF ORDER
Docket No. WEVA 79-217-R
Order No. 0662645 6/4/79

CONTEST OF CITATION
Docket No. WEVA 79-218-R
Citation No. 0660570;
6/8/79

Beckley No. 2 Mine

ORDER OF DISMISSAL

Contestant requests approval to withdraw its Contests in the captioned cases. Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The cases are therefore dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Timothy W. Gresham, Esq., Pittston Ranger, Pittston Coal Group, Ranger Fuel Corporation, P.O. Box 4000, Lebanon, VA 24266

Leo McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 1 . 1982

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :
:
v. :
:
MEDICINE BOW COAL COMPANY, :
Respondent :

Civil Penalty Proceeding

Docket No: WEST 82-153
A.O. No: 48-00900-03028

Medicine Bow Mine

DECISION

This case has been presented on stipulated facts and cross motions for judgement. The issue as stated in petitioner's brief, is whether the assessment office can properly propose a penalty on the basis of an imminent danger order issued under § 107 of the Act.

For reasons that are unexplained in the record, the MSHA inspector did not issue citations with the imminent danger order even though the description of the imminent danger also described violations of two of the safety standards. After the imminent danger order was terminated on December 16, 1981, MSHA modified it as follows:

> "The 107(a) order No: 1017366 issued December 15, 1981 while investigating a formal 103(g)(1) miner's complaint is hereby modified to include the violations of Sections §77-1605(i) and 77-1600(b) of CFR.30. The 107(a) has been terminated."

The above quoted modification was issued on January 4, 1982.

The Secretary does not argue in its brief, that the inspector made a mistake in failing to check the citation block, and that the mistake should be excused. He does not argue that on January 4, 1982 the inspector intended to or should have issued 2 citations rather than attempting to modify an order that had been terminated, and he does not argue that the modification of the order had the effect of transforming the imminent danger order into one or more citations. In fact, the Secretary's two-page brief does not even mention the modification of the order. The Secretary simply takes the position that a 107 imminent danger order is a proper foundation for a penalty proceeding.

The Secretary relies on two Commission cases in support of its position. In fact the Secretary says that these two cases "are dispositive of the legal issue in this case." The first case relied on is Secretary of Labor vs. Tazco, Inc., 3 FMSHRC 1895 (August 1981) It stands for the proposition that if a judge finds a violation he can not suspend the payment of the penalty. The the second case, Secretary of Labor vs. Van Mulvehille Coal Co. Inc., 2 FMSHRC 283 (February 1980) stands for the proposition that if a combination citation and imminent danger order is issued, the allegation of a violation of a standard survives the vacation of the imminent danger order. Far from being "dispositive ", I find these cases have little relevance to the curret issue. The Tazco case is similer to the RM Coal Company case decided by the Department of the Interior's Board of Mine Operations Appeals with reference to the 1969 coal Act 7 IBMA 64(1976). In that case Judge Kennedy had issued a default decision in which he found that one of the violations was both non-serious and non-negligent and therefore warranted a penalty of zero. The Board reversed and assessed a penalty of $1 because assessment of a penalty was considered mandatory. In the Tazco case Judge Kennedy accepted a settlement of $400 but because the mine operator had fired the foreman who had caused the violation, he suspended payment of the penalty. The Commission said that suspension of the payment was equivalent to assessing a zero penalty, and that that was improper because assessment of a penalty is mandatory. But the fact that both the IBMA and the Commission have held that assessment of a penalty is mandatory if a violation is found, does not mean that the procedures set forth in the Act for finding such a violation and assessing a penalty can be ignored.

Section 110(a) of the Act provides for the assessment of penalties for violations of a health or safety standard or any other provision of the Act, but Sections 104 and 105 provide the procedures for such assessment. Section 104 provides for the issuance of citations and orders (but not imminent danger orders) for violations of the health and safety standards. Section 105(a) provides for an assessment after "the Secretary issues a citation or order under Section 104..." There is no provision for assessment after the issuance of orders under Section 107 of the Act.

The conversion of an imminent danger order into a combined imminent danger order and citation is merely a matter of making a checkmark in an appropriate box and making reference to the appropriate section of the Act. If the Secretary was arguing that the omission of this simple step was inadvertent and that no prejudice resulted, and that insistence upon the proper steps being taken at the proper time would be elevating form over substance, I would tend to agree. If he argued that the amendment of the order to include reference to two safety standards had the effect of converting it to a citation, I might agree with that. The Secretary, however, advances neither of these arguments. He flatly contends that an order issued under Section 107 alone is an appropriate foundation for the assessment of a civil penalty. I hold that it is not. The last sentence of Section 107(a) states "The issuance of an order under this subsection shall not preclude the issuance of a citation under Section 104 or the proposing of a penalty under Section 110." This distinguishes the Mine Safety Act from the Coal Mine Act. Under Section 104(b) of the Coal Mine Act a notice of violation (citation) could not be issued if an imminent danger existed Under the old Act, an imminent danger order was an appropriate foundation for a penalty action. Under the present Act it is not.

The charges against the company are DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

Katherine Vigil, Esq., Office of the Solicitor, U.S.
Department of Labor, 1961 Stout Street, Denver,
CO 80294

Brent L. Mochan, Esq., Assistant Counsel, Medicine
Bow Coal Company, St. Louis, MO 63102

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 13 1982

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 81-274-M
Petitioner	:	A/O No: 41-00906-05001 F KL 5
	:	
v.	:	Docket No: CENT 81-275-M
	:	A/O No: 41-00906-05002 KL 5
	:	
	:	Sherwin Plant
GARRETT CONSTRUCTION COMPANY,	:	
Respondent		

DECISION

Appearances: Anna Wolgast, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia, for Petitioner
Norman Thomas, Esq., c/o Harris, Cook & Browning, P.O. Drawer 1901, Corpus Christi, TX, for Respondent

Before: Judge Moore

The three citations involved in these cases all grew out of the same accident. For some reason the assessment office assigned one of the citations a separate assessment number and as a result two penalty cases were filed. The accident occurred when two scoop drivers operating at an estimated 30 miles per hour and approaching each other in an east-west direction, both turned north to avoid a collision. They did collide and one of the drivers was killed and the other was seriously injured. The charges against the company are that the drivers were not in full control of their machines, that there were no traffic signs posted and that it did not report the accident as soon as it should have. It was stipulated that respondent was small, that there was good faith abatement and that the assessed penalties would not affect its ability to continue in business.

30 C.F.R. 55.9-24 states "Mobile equipment operators shall have full control of the equipment while it is in motion." The citation No: 171696 states that the accident was due to "failure of the equipment operators, to be in full control of the vehicles while in motion." One operator, the one who did not survive was going the wrong way in a well established traffic pattern. The surviving driver who was executing the traffic pattern correctly does not remember enough about the accident to be a valuable witness, but the accident report speculates that he may have turned north into the path of the other vehicle just before the collision. There is no evidence that either scraper was defective or that the operators did not have full control in the sense that the scrapers went anywhere other than where the operators wanted to go. The fact that a collision occurred does not establish that either of the drivers was not in control of his vehicle. See the Commission Decision in Secretary v. Old Ben Coal Company, Docket No: LAKE 80-399, FMSHRC 1800, 1804. Footnote 4. The citation is Vacated.

30 C.F.R. 55.9-71 states:

> Mandatory. Traffic rules including speed, signals, and warning signs shall be standardized at each mine and posted.

As to the word "standardized" I do not believe that the regulation requires that all parts of a mine have the same traffic rules. As to signals and warning signs, if they exist at the mine then they are posted by the very fact that they are there. There is no requirement that any particular signals and warning signs be erected. If there is a speed limit it would have to be posted but at this particular mine a speed limit would have been of no use since the scrapers did not have speedometers.

Mr. Carl White did all the hiring at this construction site and interviewed every employee. Mr. White does not speak Spanish and it was his view that if the person could speak English well enough to be interviewed in English he could speak it well enough to understand directions. Mr. Vincel Woods stated that at the beginning of every shift or when there was a change in the location where the scrapers were to dump the material, he would always take the first run and have the other drivers follow him. He always set the traffic pattern in a clock-wise direction. The only traffic rule was to follow Mr. Wood's example. Following his direction the scoops, with the aid of a push cat, would load dirt in a particular area, transport it to the levee being constructed and follow a clock-wise path back to the loading area. The road (actually a path in a large flat area created by the tracks of the vehicles) was roughly circular. A traffic sign advising drivers to follow Mr. Wood's directions would not have prevented Mr. Gonzales from going the wrong way. He obviously knew which way he was supposed to go and chose to not follow the directions. There was some evidence that he had done that in the past, but there was no suggestion that he was playing "chicken." A sign would not have prevented him from doing it again. The fact remains however, that regardless of what the regulation means concerning standardization of speed signs, signals and warning signs, it does require that traffic rules be posted. This mine did have the traffic rule that the drivers would follow the clock-wise traffic pattern demonstrated by Mr. Woods at the beginning of each shift or when a new area was being worked. That traffic rule should have been posted somewhere at the site of the construction work and it was not. The argument that the traffic rules posted 10 miles away at the plant are sufficient, is rejected. There was therefore, a violation, but since I can not find that it led to the accident I can not find that the gravity or negligence was high. The citation is affirmed and a penalty of $100 is assessed.

The accident happened at 4.30 p.m. and MSHA was not notified until 11.30 p.m., 30 C.F.R. 50.10 states in part "if an accident occurs, an operator shall immediately contact the MSHA district or sub-district office having jurisdiction over its mine." There were many reasons why it took so long to get around notifying MSHA. The accident occurred late in the shift, treatment had to be given to the surviving miner, the ambulance got lost and had to be re-contacted and directed and the families of the two victims had to be notified. Mr. Garrett did report the accident to the mine owner, Reynolds Metals Company. From his testimony it seems that the main reason he did not report it to MSHA was that he did not think it was a requirement. The site had never been inspected by MSHA. Garrett Construction Company was constructing a reservoir 10 miles from the Reynolds plant for the possible future use of Reynolds for the dumping of tailings from its milling process. The bauxite involved is mined in South America and sent to Reynolds who mills it into alumina and at a later time the alumina is turned into aluminum by a process which removes the oxygen. The idea that these construction workers did not think they were engaged in mining is easily understood. The ordinary usage of the words mine and miner, would not, in my opinion, include respondents, but the definitions of mines and mining contained in the Act is sufficiently broad to encompass respondent's operation. */ For the latest Commission decision on construction employees being miners see Sec. v. Inland Coal Company, 4 FMSHRC, Docket No: VINC 77-164 (July 15, 1982).

While I agree with respondents that there were other more important matters to take care of before notifying MSHA, there was nevertheless some time during this 7 hour period when someone should have notified MSHA of the accident. MSHA inspectors could not have arrived at the scene any earlier than they actually did but the failure to file the report is nevertheless a technical violation. I agree with the assessment office that $20 is an appropriate penalty. The citation is affirmed.

Respondent is accordingly ordered to pay, within 30 days, to MSHA a civil penalty in the amount of $120.

Charles C. Moore, Jr.
Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

Anna Wolgast, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

Norman Thomas, Esq., c/o Harris, Cook & Browning, P.O. Drawer 1901, Corpus Christi, TX 78403

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*/ The coverage issue (often referred as "jurisdiction")is thoroughly and convincingly argued in the Secretary's prehearing and supplemental briefs. The construction site is a part of a mine and respondent is covered by the Act.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 13, 1982

SECRETARY OF LABOR, : Complaint of Discrimination
on behalf of :
PHILLIP CAMERON, : Docket No. WEVA 82-190-D
Applicant :
v. : MSHA Case No. MORG CD 82-3
:
CONSOLIDATION COAL COMPANY, : Ireland Mine
Respondent :

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, PA, for Applicant, Phillip Cameron; Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent, Consolidation Coal Company.

Before: Judge Merlin

This case is a complaint filed under section 105(c)(1) of the Act by the Secretary of Labor on behalf of Phillip Cameron against Consolidation Coal Company alleging that the five-day suspension given Mr. Cameron by the company on November 6, 1981, was a discriminatory action in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1).

The complainant is a haulage motorman at the operator's Ireland Mine where he has worked since 1969 (Tr. 10-11, 59, 122). On October 31, 1981, he was the motorman on a 27-ton lead locomotive which pulled a trip of 10 to 12 mine cars filled with coal from the belt to the dumping point (Tr. 10-12, 24). Until that day he had operated with a single lead locomotive and if cars became detached he used a safety switch on the line to derail them and so prevent a runaway (Tr. 12-13). He also had a helper, Mr. Aston, who rode with him on the locomotive (Tr. 14, 15). Among other duties, Mr. Aston helped gather the empties and gave the complainant the signal to take on empties (Tr. 14-15).

On October 31, 1981, the complainant and Mr. Aston were informed by Mr. Gibson, the section foreman, that the procedure regarding these trips was changed and that thereafter instead of the safety switch there would be a 10-ton trailing locomotive at the back of the trip to act as a brake if any of the cars should uncouple (Tr. 15, 18-19, 124, 336). The complainant and Mr. Aston told Mr. Gibson they did not think the 10-ton locomotive was sufficient to hold back the trip (Tr. 20, 126). Because that day was a Saturday and other sections were not working, a 50-ton locomotive was available (Tr. 27). Consequently, for that day Mr. Gibson let the complainant and Mr. Aston use a 50-ton locomotive on their trips (Tr. 27, 128-129). Mr. Gibson told the complainant and Mr. Aston that the use of a 50-ton locomotive was only for that day and that on the following Monday a 10-ton locomotive would have to be used (Tr. 76, 337).

On Saturday night the complainant telephoned Mr. Shreves, an official of the United Mine Workers (Tr. 29). According to the complainant, Mr. Shreves agreed with him that the 10-ton locomotive was inadequate and said that if anything came up the complainant should call the union safety committee (Tr. 29, 76-79, 80). On the morning of November 2 before beginning work, the complainant also spoke to Stacy Knox, a union safety committeeman for the Ireland Mine, who according to the complainant said that if the complainant were asked to do anything hazardous he should let Mr. Knox know and that Mr. Knox would be available if mine management called him (Tr. 30, 79).

Upon arriving at work Mr. Gibson informed the complainant and Mr. Aston that a 10-ton locomotive would be used as the trailing locomotive on their trips (Tr. 30, 130-131, 337). The complainant and Mr. Aston asked for the union safety committee (Tr. 31, 130-131). The complainant's testimony is inconsistent with respect to whether he refused to work. At times he stated he did not refuse to work (Tr. 70, 71, 73, 102, 106). At other times he admitted that he had refused to work (Tr. 78, 79, 101). The same inconsistency is present in Mr. Aston's testimony (Tr. 135, 162-163, 164, 167, 173, 174). The section foreman testified that both men refused to run trips with the 10-ton locomotive as their trailing locomotive (Tr. 337, 339). The section foreman stated that upon their refusal he sent them to Mr. Fleming, the River Portal shift foreman, and they were assigned to other work carrying cribs (Tr. 133, 134, 337-339). The complainant testified that as the motorman on the lead locomotive he was himself in no immediate danger but that he feared for Mr. Aston's safety (Tr. 36, 99-100, 103). He also stated that a motorman with more seniority, Mr. Schubert, had been on sick leave for 2 years but that when Mr. Schubert returned he, the complainant, would then be on the trailing locomotive (Tr. 36, 38-39).

Mr. Fleming telephoned Mr. Omear, the mine superintendent, and told him of the actions of the complainant and Mr. Aston (Tr. 279). Mr. Omear testified that he told Mr. Fleming again to order the complainant and Mr. Aston back to work (Tr. 280). Mr. Omear stated that he told Mr. Fleming to tell the complainant and Mr. Aston that no more than 10 cars would be used on each trip (Tr. 289). Mr. Aston then said he would work if the order were put in writing (Tr. 162-163, 174, 280-281). The order to work was not put in writing and according to Mr. Omear such orders customarily are not put in writing (Tr. 281). Mr. Aston admitted that putting the order in writing would not have affected the alleged lack of safety in using the 10-ton locomotive as a trailing locomotive (Tr. 175-177).

Mr. Omear also ordered Mr. Fleming to obtain a 10-ton locomotive so that a test could be run to demonstrate to the complainant and Mr. Aston that the procedure would be safe (Tr. 282). A locomotive was obtained but some of its sanders were not working so they were repaired (Tr. 288). In the meantime while the complainant and Mr. Aston were loading cribs, Mr. Bettinazzi, the operator's safety supervisor, spoke to them (Tr. 349). The complainant and Mr. Aston again expressed a view that the 10-ton locomotive was not safe but Mr. Bettinazzi questioned the position in which they were putting themselves because they had not tested a 10-ton locomotive as a trailing locomotive on any of their trips (Tr. 349, 352-353). Finally, a 10-ton locomotive was ready and tests were performed on two of the steepest available grades selected by the complainant (Tr. 49, 96-97, 98, 138, 139, 189, 241, 289-290, 357). First the trip was stopped and the brake of the lead locomotive was then released (Tr. 49, 138, 290). Next the trip was allowed to drift back about 10 feet before brakes were applied (Tr. 50, 139, 290-291). In both instances the 10-ton locomotive held (Tr. 50, 139, 290, 291, 356-357). The complainant, Mr. Aston, and the union safety committeeman, Mr. Wise testified that they were not satisfied with the test results because the trip had no speed, an actual runaway situation was not created and the trolley pole on the trailing locomotive was

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in the wrong position (Tr. 50, 52, 53, 108, 139-140, 189, 227-228). However, the operator's superintendent testified that during the test the 27-ton lead locomotive remained attached to the trip (Tr. 290). This was additional weight pressing against the trailing locomotive and would not be present in a true uncoupling because in an actual occurrence the lead locomotive would detach itself from the trip (Tr. 260-261). Despite their dissatisfaction with the test the complainant and Mr. Aston returned to work that day (Tr. 52-53, 141).

On November 5th a further test of the 10-ton locomotive was performed for state and MSHA inspectors on the same steep grade as the prior test (Tr. 97-98, 245-247). On this test the trip was allowed to coast 100 feet before the trailing locomotive was used to brake and stop the cars (Tr. 142, 189, 191, 257, 261, 268, 292, 358-359). The trip stopped within 150 or 200 feet (Tr. 142, 189, 239, 257, 268, 292, 359). Based upon this test the state and federal inspectors felt the 10-ton locomotive was safe (Tr. 189-190, 257, 292, 295, 359). Mr. Aston was still afraid and testified that in his opinion the only way to do a valid test would be to have an uncoupling without telling the motorman on the trailing locomotive (Tr. 143-146, 262). Mr. Wise, the safety committeeman testified that the test was not valid because it was controlled (Tr. 189). In particular, he objected to the fact that the trolley pole on the trailing locomotive had been turned (Tr. 190-192, 227-228). The operator's witnesses took the position that the test was even more adverse than actual circumstances because in an actual uncoupling the cars would come to a stop before they started to move back whereas in the second test the cars were allowed to move back 100 feet immediately prior to the trailing locomotive being used to brake them (Tr. 293-295, 324-325, 358-359). Moreover, the 27-ton lead locomotive remained attached to the trip and again was additional weight pressing against the trailing locomotive which would not be so in a actual uncoupling (Tr. 260-261, 264). The day after the test was performed for the inspectors the operator suspended the complainant for five days.

In *Pasula* v. *Consolidation Coal Company*, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds, *Consolidation Coal Company* v. *Marshall*, 663 F.2d 1211 (3rd Cir. 1981), the Commission held that the complainant establishes a *prima facie* case of a violation of section 105(c)(1) if he proves by a preponderance of the evidence that (1) he engaged in protected activity, and (2) the adverse action was motivated in any part by the protected activity. The Commission further decided that an operator may respond by either rebutting the prima facie case or if it cannot rebut by showing as a defense that even if part of its motive were unlawful, (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone.

It must first be determined what the complainant did. As already noted, at times during his testimony the complainant alleged that he only asked for the union safety committee but did not refuse to work (Tr. 70, 71, 73, 102, 106). At other times he admitted he refused to work (Tr. 78, 79, 101). Mr. Aston testified about refusing to work in a similarly contradictory manner (Tr. 135, 162-163, 164, 167, 173, 174). Mr. Gibson, the section foreman, testified that the complainant had refused to work (Tr. 337-339). The testimony of the operator's other witnesses also was that the complainant had refused to work (Tr. 279, 280, 289, 348). Even the union safety committeeman, Mr. Wise, who testified for the complainant stated that under the circumstances he would say the complainant had refused to work (Tr. 226). I also note that the complainant and Mr. Aston were assigned to other work (Tr. 40, 133, 337-339). This assignment makes no sense unless they had in fact refused to work. If the complainant had merely asked for the safety committee, mine management would not on its own initiative have disrupted operations by voluntarily assigning him to other work. The haste and urgency with which the mine superintendent arranged to test the 10-ton locomotive is only explicable in light of a refusal to work by the complainant and Mr. Aston. The test was arranged in order to satisfy the complainant so that he would return to work.

The complaint (Para. 5), the Solicitor's prehearing statement, her oral statement at the close of the Secretary's case at the hearing, and her brief all allege a protected right to refuse to work under the circumstances of this case. The reason for the complainant's belated protestations at the hearing that he merely asked for the union safety committee obviously was his realization that under the collective bargaining agreement he could refuse to work only in conditions that were abnormally and immediately dangerous to himself beyond the normal hazards inherent in the operation which could reasonably be expected to cause death or serious physical harm before abatement. (Optr.'s Exh. No. 1, pg. 2). At the hearing the complainant admitted the situation was not of this nature (Tr. 37, 75). The great weight of the evidence demonstrates that the complainant refused to work and I so conclude.

I further conclude that the operator suspended the complainant because of his refusal to work. The suspension letter states that the complainant did not exercise his individual safety rights in good faith under Article III section (i) of the National Bituminous Coal Wage Agreement of 1981 which as set forth in the immediately preceding paragraph gives the employee a right not to work in conditions abnormally and immediately dangerous to himself. (MSHA's Exh. No. 1) Even more importantly, the testimony of all the operator's witnesses and most particularly the superintendent makes clear that it was the complainant's refusal to work which so disturbed mine management. The superintendent stated that if the complainant had filed a safety grievance or had used the safety committee before refusing to work he would not have been disciplined (Tr. 318).

Under applicable Commission decisions a miner may refuse to work if he has a good faith, reasonable belief regarding the hazardous nature of the condition in question. *Pasula, supra*; *Robinette* v. *United Castle Coal Company*, 3 FMSHRC 803 (April 1981); *Dunmire and Estle* v. *Northern Coal Company*, 4 FMSHRC 126 (February 1982). Good faith simply means an honest belief that a hazard exists. *Robinette*, 3 FMSHRC at 810. A reasonable belief does not have to be supported by objective ascertainable evidence. Rather the miner's honest perception must be a reasonable one under the circumstances. Such reasonableness can be established at a minimum through the miner's own testimony as to the conditions responded to with the testimony evaluated for its detail, inherent logic and overall credibility. Corroborative physical testimonial or expert evidence also may be introduced and the operator may respond in kind. *Robinette*, 3 FMSHRC at 812. Unreasonable, irrational or completely unfounded work refusals are not within the purview of the statute. *Robinette*, 3 FMSHRC at 811. I conclude that the tests which were performed on the 10-ton locomotive on November 2 and November 5 demonstrated that it could be used safely as a trailing locomotive in the manner proposed by the operator. This circumstance however, does not preclude a reasonable, good faith belief on the part of the complainant regarding the existence of a hazard.

The Act's protection may be extended to those who possess the requisite belief even if the evidence ultimately shows the conditions were not as serious or hazardous as believed. Consolidation Coal Company, 663 F.2d at 1219; Dunmire, 4 FMSHRC at 131. The reasonableness of the belief must be judged as of the time it was held.

The complainant said he did not believe the 10-ton locomotive was big enough to stop the trip of mine cars (Tr. 20). The complainant had been a motorman for several years and had used a 10-ton locomotive to pull trips of supply cars carrying materials such as roof bolts and gravel (Tr. 20-21). The complainant maintained that the trips of supply cars he had pulled were composed of fewer and smaller cars so that they did not weigh as much as a trip of mine cars (Tr. 21-23). The operator's witnesses pointed out that more power was needed from a lead locomotive which pulls a trip than from a trailing locomotive whose function is to stop uncoupled cars (Tr. 314-315, 352, 360). But the operator's superintendent could not remember whether the operator ever had used a 27-ton motor as a lead locomotive and a 10-ton motor as a trailing locomotive on main haulage (Tr. 311). In determining the honesty and reasonableness of the complainant's belief, I find relevant the fact that the procedure for using a 10-ton trailing locomotive on a trip of mine cars such as the complainant drove was new and had not been done previously in this mine. Despite his experience as a motorman the complainant therefore, had never been confronted with this precise situation. Moreover, there were some grades over which the mine trip had to travel which reasonably could be expected to add to his concern (Tr. 23-24). The MSHA inspector testified that until the test was performed, he did not know whether the trip would hold (Tr. 266). After weighing all the evidence I determine that the record supports the complainant's position that his belief about the safety hazard was in good faith and was reasonable.

This brings us to the most significant issue presented by this case. May a miner refuse to work when he himself is in no danger but the risk is to someone else? The complainant admitted that use of a 10-ton trailing locomotive on the day in question posed no danger to him (Tr. 36, 99, 100). The risk was only to Mr. Aston who would be riding the trailing locomotive (Tr. 36, 99). As set forth above, the collective bargaining agreement specifically provides that an employee will not be required to work under conditions he has reasonable grounds to believe to be abnormally and immediately dangerous to himself. Because any danger that might have been present was not to the complainant himself the

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arbitrator upheld the disciplinary suspension under the collective bargaining agreement (Optr's. Exh. No. 1). I do not believe the arbitrator's decision is binding here nor do I believe it has any collateral estoppel effect under criteria set forth by the Commission regarding the issues presented here. Bradley v. Belva Coal Company, 4 FMSHRC 982 (June 1982). The Mine Act does not contain language the same as or similar to that in the collective bargaining agreement regarding individual danger. In addition, under the collective bargaining agreement the test of the hazard is much stricter than that under the Mine Act and according to the arbitrator's decision objective evidence must support the miner's belief.

The Mine Act does not contain any provision expressly granting a miner the right to refuse to work. Relying upon legislative history and statutory purposes the Commission in Pasula interpreted the Act to afford a right to refuse to work in unsafe or unhealthful conditions. 2 FMSHRC at 2790-2793. However, Pasula presented an individual whose own health and safety were being jeopardized at the time he refused to work. The Commission made this very clear in its decision as follows:

> Pasula was not merely speculating that he might in the future suffer from the effects of loud noise, but he was already so suffering when he stopped the machine. He was not equipped with personal hearing protectors, he had already been or would have shortly been exposed to more noise than permitted by the applicable mine health standard, and he was also operating a machine that requires substantial attention to its operation. In view of his actual suffering, his view that he was exposed to unhealthful and excessive noise levels was reasonable and was supported by objective, ascertainable evidence.

2 FMSHRC at 2793.

Upon review, the Third Circuit in Consolidation Coal Company held that the statutory scheme in conjunction with the legislative history supported a right to refuse to work in the event the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health, stating in this respect as follows:

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> Under the circumstances of this case, neither party in their briefs took a position contrary to the existence of a right to walk off the job. Thus, although we need not address the extent of such a right, the statutory scheme, in conjunction with the legislative history of the 1977 Mine Act, supports a right to refuse to work in the event that the miner possesses a reasonable, good faith belief that specific working conditions or practices threaten his safety or health.

663 F.2d at 1217 n.6. (Emphasis supplied).

Thus in upholding the right to refuse to work the Third Circuit referred to the individual's belief of a threat to his own health or safety. Although the Court stated it was not defining the perimeters of the right to refuse to work, its holding that the miner did not have the right to shut down a continuous mining machine, thereby preventing others from working, indicates that the right to refuse to work has rather strict limits and that it does not extend beyond the endangered individual himself. 1/

Although the legislative history, as explained in Pasula, supports an interpretation of the Act which affords a protected refusal to work, it does not support giving this right to miners who are not in danger. The relevant committee report refers to a refusal to work in conditions believed to be unsafe or unhealthful. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623-624 (1978) ["Leg. Hist."]. The discussions on the floor of the Senate and House make clear Congress was concerned about individuals who face a threat to their own health or safety. Discussion on the Senate floor in this respect was as follows:

> Mr. Church. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 106(c), the discrimination clause.

1/ One individual can, of course, communicate to the operator on behalf of other endangered persons who also have decided for themselves not to work. Dunmire, 4 FMSHRC at 134.

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> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protesting [sic] them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> Mr. Williams. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> Mr. Javits. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

Leg. Hist. at 1088-1089 (Emphasis supplied).

Similarly in the House of Representatives, Congressman Perkins in discussing the bill as agreed to by the Conference Committee stated:

> Mr. Speaker, this legislation also provides broader protection for miners who invoke their safety rights. If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, Baker v. North American Coal Co., 8 IBMA 164 (1977) held

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> that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

Leg. Hist. at 1356 (Emphasis supplied).

The complainant also relies upon the fact that at the time in issue Mr. Schubert, who was the senior motorman for a lead locomotive, had been on sick leave for 2 years due to an accident but that when he returned, the complainant as the junior motorman might then be on the trailing locomotive. I conclude that what might or might not have happened when Mr. Schubert returned to work was too remote and speculative on November 2, 1981 to provide a basis for the complainant to allege he was in any danger. At that time Mr. Schubert might never have returned or if he did, the complainant might have been working somewhere else. 2/

The complainant has referred to the "buddy" system and the principle that in the mines, a miner is responsible for the safety of his co-workers and especially for one with whom he is working as a team (Tr. 40). I recognize and acknowledge these factors and I am, of course, cognizant of the safety purposes which this statute was enacted to advance and pursuant to which it must be liberally construed. Nevertheless, I conclude that the right to refuse to work which is after all, only implied and not express cannot be so greatly expanded in these proceedings. As set forth above, such action would be contrary to judicial precedent and unsupported by legislative history. Moreover, the extension of the right of refusal to individuals such as the complainant would have great practical impact in the mines by creating the possibility of continual disruption in operations through work stoppages caused by challenges to management decisions from miners whose health and safety are not in danger. The wide ramifications of such situations are demonstrated by the record in this case. The mine superintendent testified that if the complainant had been willing to run the lead locomotive when Mr. Aston had been afraid to be on the trailing locomotive, it would have been

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2/ Mr. Schubert did return a few months thereafter but the record does not indicate what job he performed upon his return or what job the complainant had then (Tr. 39).

up to mine management to find someone else to go on the trailing locomotive or some other means (Tr. 323-324). Upon questioning from the bench, the complainant testified that he did not know what he would have done if mine management had found someone else to go on the trailing locomotive and he indicated that in that event a relevant inquiry would be whether or not such other individual was experienced (Tr. 117-120). It was clear to me at the time I listened to complainant and later when I read the transcript that he intended to reserve to himself the right to decide whether he would accept any other individual assigned by the operator to be his trailing motorman.

It is therefore only a short step from challenging management's decisions to usurping its right to make them at all. In light of these factors, I find pertinent and persuasive the following statement of the Court of Appeals for the Seventh Circuit in Miller v. FMSHRC, 687 F.2d 194, 196 (1982): "We are unwilling to impress on a statute that does not explicitly entitle miners to stop work a construction that would make it impossible to maintain discipline in the mines."

The Solicitor and operator's counsel filed detailed briefs which have been most helpful in analyzing the record, defining the issues and deciding the case. I have reviewed and considered these excellent briefs. To the extent they are inconsistent with this decision however, they are rejected.

In light of the foregoing, I conclude that the complainant had no right under the Act to refuse to work and that therefore he did not engage in protected activity. Accordingly, he must be denied relief and his complaint dismissed.

ORDER

It is Ordered that the complaint be DISMISSED.

Paul Merlin

Paul Merlin
Chief Administrative Law Judge

Distribution: Certified mail.

Covette Rooney, Esq., Office of the Solicitor, U. S.
Department of Labor, Rm. 14480-Gateway Building,
3535 Market Street, Philadelphia, PA 19104

Robert M. Vukas, Esq., Consolidation Coal Company,
1800 Washington Road, Pittsburgh, PA 15241

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 17 [illegible]

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner : Docket No. PENN 82-83

v. : A. C. No. 36-00967-03107 F

BCNR MINING CORPORATION,
Respondent : Clyde Mine

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on December 13, 1982, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement respondent would pay a reduced civil penalty of $2,000 instead of the penalty of $10,000 proposed by the Assessment Office for the single violation of 30 C.F.R. § 75.200 involved in this proceeding.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. As to the criterion of whether the payment of civil penalties would cause respondent to discontinue in business, there are no data with respect to respondent's financial condition in the motion or in the official file. The former Board of Mine Operations Appeals held in Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that when an operator fails to present any evidence with respect to its financial condition, a judge may presume that the payment of penalties would not affect the operator's ability to continue in business. In the absence of anything in the record to indicate that a contrary conclusion should be reached, I find that the payment of penalties will not cause respondent to discontinue in business.

There is a considerable amount of materials in the file pertaining to the criterion of respondent's history of previous violations. Those materials show that during the 24 months preceding the writing of the violation alleged in this proceeding, respondent was assessed penalties for 608 violations at its Clyde Mine which is here involved. Under the assessment formula which was in effect prior to May 21, 1982, when the violation here involved was cited, a total of five penalty points would be assessed under section 100.3(c)(1) of the penalty formula described in 30 C.F.R. § 100.3. It is not possible to determine the number of penalty points which should be assessed under section 100.3(c)(2) of the penalty formula because the record does not contain information showing the number of inspection days which were associated with the assessment of penalties for 608 violations.

A computer printout submitted by the Secretary's attorney does show, however, that 8 violations of section 75.200 were cited at the Clyde Mine during the 4 months of 1979 included in the 24-month period preceding the

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issuance of the withdrawal order involved in this proceeding. During 1980, the inspectors cited 32 violations of section 75.200 at the Clyde Mine, and during the applicable 9 months of 1981, the inspectors cited 26 violations of section 75.200. If the aforesaid number of violations for each applicable period is divided by the number of months during which the violations were cited, it will be seen that an average of 2 violations per month of section 75.200 was cited in 1979, an average of 2.6 violations per month of section 75.200 was cited in 1980, and an average of 2.8 violations per month of section 75.200 was cited in 1981. During that same period of time, production at the Clyde Mine fell from 496,846 tons in 1980 to 293,515 tons in 1981. The foregoing data, therefore, support a conclusion that respondent has been cited for an increasing number of violations of section 75.200, despite a sharp decline in production, which indicates an unfavorable history of previous violations. In such circumstances, I would have assessed a penalty of at least $400 under the criterion of history of previous violations if I had been assessing a penalty in a decision issued on the basis of a hearing, assuming that respondent could not, at a hearing, have been able to adduce evidence to show that its history of previous violations is not as bad as the figures given above seem to indicate.

As to the criterion of the size of respondent's business, the motion for approval of settlement shows that respondent's total production from all mines declined from 3,967,334 tons in 1980 to only 1,993,552 tons in 1981. As indicated in the preceding paragraph, there has been a similar decline of production at the Clyde Mine. Even so, respondent should still be classified as a large company as to which penalties should be assessed in an upper range of magnitude insofar as they are determined under the criterion of the size of respondent's business.

The motion for approval of settlement states that respondent demonstrated a good-faith effort to achieve rapid compliance by closing down the entire section, trimming any loose, unsupported ribs, installing rib posts where needed, and reviewing the roof-control plan with the miners. Since a withdrawal order was the vehicle used to cite the violation, the inspector did not give a specific period of time within which the violation had to be abated, but the violation was abated in a subsequent action sheet issued at 10:30 a.m. on the day following the citing of the violation. In such circumstances, respondent probably should be given some reduction in the penalty otherwise assessable under the other five criteria. I believe that the settlement penalty of $2,000 reflects some tempering of the penalty under the criterion of rapid good-faith abatement.

The motion for approval of settlement shows that the primary criteria considered by the Secretary's counsel in agreeing to a reduction of the proposed penalty to $2,000 was based on an evaluation of the two criteria which have not yet been discussed, that is, gravity and negligence. The violation of section 75.200 was cited in Order No. 1050164 which alleged that respondent had violated Safety Precaution No. 29 of its roof-control plan because there were loose and unsupported ribs in the No. 5 entry and crosscuts right and left of the No. 5 entry near survey station 28+60 in the 2 Flat Section. Safety Precaution No. 29 requires that loose ribs be taken down or supported by erection of cribs or other supports in addition to the installation of roof bolts on 4-foot centers.

There can be no doubt but that the ribs were loose in the vicinity of the continuous-mining machine because the operator of the machine was killed when the ribs on the left side of the entry fell on him. The motion for approval of settlement, however, states that the inspector cited the violation of section 75.200 on the basis of an inspection of the mine at 5 a.m. on Thursday which was about 6-1/2 hours after the occurrence of the fatal accident on Wednesday evening. The motion for approval of settlement states that interviews of the miners working on the 2 Flat Section at the time the accident occurred do not show that the ribs on the left side of the entry were observably loose prior to the occurrence of the accident. In such circumstances, the motion for approval of settlement concludes that, if a hearing had been held, it would have been difficult for the inspectors to support that respondent was negligent in failing to observe the loose ribs and erect additional rib supports prior to the occurrence of the accident.

The motion for approval of settlement shows the applicability of the Commission's observation in Old Ben Coal Co., 4 FMSHRC 1800, 1804 (1982) where the Commission noted that:

> * * * A violation may occur absent an accident, and an injury or death does not ipso facto make out a violation. As here, however, an accident may sometimes shed light on an unsafe situation that had escaped previous notice or citation. * * *

In this proceeding, it is obvious that the ribs were loose or they would not have fallen upon the operator of the continuous-mining machine. On the other hand, there may have been no indication that the ribs were loose enough to be observable prior to the occurrence of the accident. The copy of MSHA's accident report in the official file shows that the helper to the operator of the continuous-mining machine stated that the rib did not appear to be loose on the left side of the entry until after a portion of the coal pillar had been taken on the left side of the entry.

The discussion above shows that most of the settlement penalty of $2,000 would be assessable under the criterion of gravity because roof and rib falls still account for a large percentage of injuries and deaths in underground coal mines. As the foregoing discussion of respondent's history of previous violations shows, respondent is still being cited for an increasing number of violations of section 75.200. Nearly all violations of section 75.200 have a capacity of causing injury or death. Therefore, it is appropriate that respondent be assessed a penalty of $2,000 primarily under the criterion of gravity in the hope that respondent will devote an increasing effort to reducing violations of section 75.200 at its Clyde Mine.

The facts discussed above support a conclusion that the settlement agreement should be approved because there were sufficient mitigating factors surrounding the occurrence of the alleged violation to support a reduction of the proposed penalty of $10,000 to the settlement amount of $2,000.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement filed on December 13, 1982, is granted and the settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, respondent, within 30 days from the date of this decision, shall pay a civil penalty of $2,000.00 for the violation of section 75.200 alleged in Order No. 1050164 dated September 24, 1981.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Howard K. Agran, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

B. K. Taoras, Esq., Attorney for BCNR Mining Corporation, Kitt Energy Corporation, 455 Race Track Road, P. O. Box 500, Meadow Lands, PA 15347 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 22 1982

MATHIES COAL COMPANY,
Contestant-Respondent

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner-Respondent

Contest of Citation

Docket No. PENN 82-9-R
Citation No. 1142337; 9/22/81

Docket No. PENN 82-10-R
Citation No. 1142336; 9/22/81

Civil Penalty Proceeding

Docket No. PENN 82-35
A.O. No. 36-00963-03182

Mathies Mine

DECISIONS

Appearances: Janine C. Gismondi, Attorney, U.S. Department of Labor, Philadelphia, Pennsylvania, for MSHA; Jerry Palmer, Attorney, Pittsburgh, Pennsylvania, for Mathies Coal Company.

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases were heard on the merits in Pittsburgh, Pennsylvania on September 14, 1982. Docket No. PENN 82-35, concerns a proposal for assessment of civil penalties filed by the Secretary pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalties for two alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. Docket PENN 82-9-R is the contest filed by Mathies Coal Company challenging one of the citations issued in the civil penalty case, and Docket PENN 82-10-R is the contest challenging the second citation.

Issues

The principal issues presented in the civil penalty proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

The issues presented in the Contests are whether the conditions or practices cited by the inspector as the basis for the citations constituted significant and substantial violations of the cited mandatory safety standards.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated that Mathies Coal Company and the subject mine are subject to the Act, and that the presiding Judge has jurisdiction to hear and decide these cases. The parties also stipulated that the payment of the civil penalties proposed by MSHA will not adversely affect the operator's ability to continue in business, and that mine production for the period January 1, 1982 to May 21, 1982, was 73,000 tons, and that the mine ceased production on May 31, 1982.

Discussion

Section 104(a) citation No. 1142336, September 22, 1981, cites a violation of mandatory safety standard 30 CFR 75.1105, and the condition or practice is described on the face of the citation as follows:

> The air current used to ventilate the battery charging station located in the No. 7 entry at surveyor station 3+46 in the 4 face 24 butt parallel section MMU054 was not coursed directly into the return. The air was going to the working face. The charge unit was setting in the middle of the entry. (The charge unit has been dangered out until a proper station can be constructed.)

The inspector indicated that the alleged violation was "significant and substantial", and he fixed the abatement time as 4:00 p.m., September 22, 1981.

Section 104(a) Citation No. 1142337, September 22, 1981, cites a violation of mandatory safety standard 30 CFR 75.1722(a), and the condition or practice is described on the face of the citation as follows:

> Adequate guarding was not provided for the cross-over belt conveyor at the drive head in the 4 Face 24 Butt Section MMU034. The head drive was not guarded so to protect person from coming in contact with moving parts.

The inspector indicated that the alleged violation was "significant and substantial" and he fixed the abatement time as 12:00 p.m., September 23, 1981.

MSHA's Testimony and Evidence in Support of Citation No. 1142337

MSHA Inspector Francis E. Wehr, Sr., testified as to his background and experience, and he confirmed that he inspected the mine on September 22, 1981, and he confirmed that he issued a citation (exhibit G-1) for a violation of section 75.1722(a), for failure by the operator to properly guard the drive motor or drive head of one of its conveyor belts. He described the "drive head" as consisting of two rollers, gear sprockets and a chain, and he explained that the belt is laced through the two rollers and it drives the belt by pulling it through the rollers as it is laced. The drive head is powered by a 460 AC horsepower motor, and the drive head roller is approximately 15 to 20 feet in length, and the moving parts include the rollers, belts, gears, and chain drive. The belt was operating when he cited it and the moving parts of the drive head were in motion (Tr. 8-17).

Mr. Wehr confirmed that the drive head did have a guard around it, and he identified exhibit G-2 as a simulated "drawing of a cutout" indicating the type of guard being used (Tr. 17). He described the guarding as one-by-six boards nailed across the length of the conveyor belt to several posts which were anchored to the mine floor and wedged solidly into the roof. The posts were approximately on five-foot centers, and the posts were about 8 1/2 to 9 feet high. The posts were of wood, approximately 6 to 10 inches in diameter, and the horizontal boards extended along a 15 to 20 foot distance for the full distance of the drive head, and they were nailed to the posts. The openings in the wooden guarding were approximately 2 feet in height and 4 feet wide (Tr. 17-22).

Mr. Wehr stated that he measured the distance between the existing guarding and the drive head itself by a folding rule which he inserted through the guard opening, and found that it was approximately two feet.

These were the narrowest location between the guard and the belt, but the separation between the guard and belt became wider as it went by the belt (Tr. 23).

Mr. Wehr identified exhibit G-3 as a copy of the guarding regulation found in MSHA's "manual", and in his opinion the existing guarding which he observed on September 22, would not prevent an employee from possibly coming into contact with the moving parts of the drive head. He believed that the guarding openings were large enough to allow a person's hand to pass through, and the openings did not comport with the policy guidelines which state that they be small enough to prevent this from happening (Tr. 25).

Mr. Wehr testified that one person is normally assigned to the belt conveyor system to shovel or clean up spillage, conduct hand dusting, or to check out the belt, and this is usually during one shift. If problems are encountered, extra people may be assigned to the belt (Tr. 26). In addition, the fire boss or foreman would have occasion to travel the belt area for the purpose of conducting his belt line examination, and this is required to be done once during each production shift (Tr. 27). He also indicated that the floor bottom in the section is wet and damp, and the location of the belt was at the top of a small grade starting in on the section, and these factors would present a slip or fall hazard and someone could actually fall through the guard openings and suffer possible fatal injuries (Tr. 28).

Mr. Wehr stated that he has observed at least ten other similar belt heads in the same mine and that they are all guarded by wire mesh nailed to boards and posts, or the wire mesh is hung up, and the opening in the mesh is approximately one inch square (Tr. 29). He also identified exhibit G-6 as a head roller design similar to the one he cited (Tr. 37).

Mr. Wehr identified exhibit G-1(a), as a copy of his "inspector's statement" which he filled out at the time the guarding citation was issued, and he indicated that with respect to the likelihood of any accident occurring he marked "probable" (Tr. 60), and the statement was admitted without objection (Tr. 61).

In response to bench questions, Inspector Wehr conceded that the existing guarding did guard part of the head roller, and he indicated that the roller changes position with respect to the drive mechanism. He also indicated that the distance from the guarding to the particular roller in question was four feet, and the distance from the guard to the drive head was two feet. The unguarded moving parts were approximately two feet from the floor (Tr. 62-63).

Mr. Wehr could not state why the openings around the guarding framework were left as they were, but he did indicate that similar wooden guarding framework was used around the other belt locations previously referred to, but that wire mesh was installed over it to provide a sturdy construction. He conceded that the operator made an attempt to guard the area in question, and he confirmed that the belt was newly installed and had been in operation for three to four weeks. He also conceded that it was possible that the operator intended to cover the framework with meshing but had no opportunity to do so (Tr. 64). Although he discussed the matter with the operator's escort, Mr. Dunbar, his notes do not reflect any specific comments in this regard (Tr. 65). The citation was abated by the installation of wire mesh over the guarding framework, and he abated the citation on September 29th (Tr. 65).

Mr. Wehr stated that the bottom horizontal one-by-six board which was nailed across the posts was approximately one foot off the ground, that the second board was approximately four feet off the ground, and that the third board which was located at the top running horizonatlly to the roof was "fairly close to the top" (Tr. 65-67). In response to a question concerning someone reaching the moving belt parts while walking adjacent to the framework and slipping, he replied (Tr. 67):

> THE WITNESS: At the distance where the four foot mark is, that area, he would probably not come in contact with the head roller itself, but the area where the two foot is, he would be right into the general area of the roller and the drive unit itself.

Mr. Wehr stated that he observed no one performing any work in the belt area at the time the citation issued, but there is a supply storage place in the area and an individual was there (Tr. 67). The preshift examination was made on the prior shift, and the belt was a working belt which was connected to a feeder and the belt portion which had been installed was about 250 feet long (Tr. 68).

Mr. Wehr indicated that the manufacturer of the belt drive did provide "a metal guard, two halves that bolt around the gear sprocket, gears and the chain on the drive head itself" (Tr. 72). He conceded that this guard did decrease the severity where there are two or three extra guarded parts, but indicated that his principal concern was the two rollers which drove the belt and the belt lacing (Tr. 73-74). In reply to further questions from the bench, Mr. Wehr responded as follows (Tr. 74-79):

> Q. All right. Looking at that picture, if someone were walking adjacent to this, the post they had, which is two feet out from the edge of this machinery, someone who accidentally slipped on that adjacent walkway or whatever, it would take a little bit for him to get into those rollers, wouldn't it? The fellow just could not walk back there and slip through this opening over all this steel construction and fall into those rollers?

THE WITNESS: I'd say it's possible.

Q. Well, anything is possible, but let us look at the real world. How could someone accidentally slip through one of these openings and fall over that?

THE WITNESS: The openings itself? I would say the possibility is there, plus the guard and type of board that you have is one inch and say a fellow that is your size is walking along the side and would trip and fall, he'd more than likely burst through that board or he could slip underneath, strike his head against the metal part of that frame. The wetness of the bottom and the grade was another factor into it.

Q. Was this a regular travel way?

THE WITNESS: That would have been their walkway side, as they call it. They call one side their clearance side.

Q. What I mean is this an area where the miners would go through or is it an area where it is visited by the examiner or if they had some work to do there?

THE WITNESS: The examiner and the guy assigned to go through that area.

Q. They do not have anybody permanently stationed at this location?

THE WITNESS: To the best of my knowledge, they don't.

Q. Would a miner walk back and forth through this area where they were working and that sort of thing?

THE WITNESS: No, sir.

Q. How do they perform maintenance on this equipment assuming if the mesh were up? Is this mesh permanently installed to these wooden frameworks?

THE WITNESS: Generally it's set up so it could be taken down and put right back up. Generally, the rule is that before you take any guards down, they have what they call japko switches along the beltline and locked. The guards are removed and the cleaning process is supposedly done there and the guard put back on and then you lock it and put the power back on.

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Q. You were the resident inspector at this point for approximately five or six months?

THE WITNESS: Yes, sir.

Q. Did you have occasion to look at the other ten similar belt mechanisms that were guarded?

THE WITNESS: Yes, sir.

Q. Are you familiar with the cleanup process and everything?

THE WITNESS: Yes, I would say so.

Q. Did you have occasion to cite them for cleaning without locking out the equipment? What has been the general practice of the mine, for example, when they perform maintenance on these moving parts?

THE WITNESS: The maintenance that was observed over that period was fine. They did lock it out. They took on the precautionary work when they was in there doing work. The actual cleaning around the belt drive itself, I could not see that. I seen them cleaning around the belt but not along the drive.

Q. What cleaning would be done around the particular drive that was not guarded, in your opinion?

THE WITNESS: A lot of times you have spillage coming back from the bottom belt, particularly where you would have a scraper in between those two drive rollers. It does collect a lot of dirt at times.

Q. What is the procedure there for cleaning that particular location? What do they do with that material? Would you say the fellow who is cleaning would be in close proximity?

THE WITNESS: If he has it shut off, he has to move the guard and put the guard back up and shovel it out the belt. That is the practice I would observe.

And, at (Tr. 94-96):

Q. If a fellow slipped and the outer guarding, the posts, the boards are four feet from the edge of the equipment and then there is another two feet, how could he possibly fail there? It would have to be a conscious act, wouldn't it?

THE WITNESS: I have problems with what you are saying. You are using the four feet. The two foot was right close to the rollers. I'm saying the two foot. The four feet is the widest part. The two feet is the closest to the roller.

Q. My question is addressed to the four feet. Is it possible for someone to get into that unguarded equipment if the guard is four feet away from it?

THE WITNESS: I believe the four foot where it was, not really. The two foot area, yes, and there is a picture showing where the two foot and the four feet are.

Q. The existing posts were up to cover that entire 15 to 20 or 30 feet distance, weren't they?

THE WITNESS: Yes.

Q. It included the wheel area?

THE WITNESS: Right.

Q. If it is not likely that anybody would fall in there, I just wonder why management decided to extend it for 30 feet, why they put that framing up to begin with.

THE WITNESS: It is a general practice. This is how they guard. They extend it more distance than they need to, but that's the way to guard.

Mathies Coal Company's Testimony and Evidence Concerning Citation No. 1142336

Mathies Coal Company opted not to present any testimony in defense of this citation, and counsel indicated during the course of the hearing that he stood by his motion to dismiss this citation and he relied on his arguments presented during the course of the hearing.

MSHA's Testimony and Evidence in Support of Citation No. 1142336

Inspector Wehr identified exhibit G-7 as a copy of the citation he issued for an alleged violation of section 75.1105 for failure to properly locate a battery charger away from air being coursed directly into the return. The scoop in question was used to charge a scoop tractor which was being used on the section. The scoop is usually charged for a couple of hours each shift to keep it running, and the scoop is normally used two shifts a day, although at times it is used on three shifts. The scoop cannot be used while it is being charged, and the purpose of the section 75.1105 requirement that the air current used to ventilate the battery charger be coursed directly into the return is to carry away smoke in the event of a fire, or to carry off explosive hydrogen which may be released during the battery charging process (Tr. 99-105).

Inspector Wehr identified exhibits G-8 as a sketch he drew depicting where the battery charger was located when he observed it, and he stated that it was located in the neutral intake entry next to the right return. His attention was drawn to the charger when he came from the face area and noticed a cable going through a wall over the track entry. He followed the cable through two stopping man doors, and he found the cable plugged in but with no power on it and the "breaker wasn't set up". He identified the cable as the "dotted line" on exhibit G-8. The cable was hung up on well insulated roof and rib insulators from the charger to the belt starter box or transformer (Tr. 106). The battery charger was some 300 feet from the belt transformer, and the transformer is not normally used as the source of power for the cable. The battery charger was not operating at the time he observed it and there was no tag on the power plug. In order to energize the battery charger it would have first been necessary to energize the transformer belt starter box and a scoop tractor timing switch would have had to be turned on. The power cable was hooked up to the battery charger and it did pass through a proper fitting (Tr. 107-111).

Mr. Wehr described the air flow over the battery charger as it existed at the time he cited the condition, and he indicated that in the event of smoke coming from the battery charger, it would have been directed to the working face or place, or both. He identified the return entry on exhibit G-8, and he stated that the air could have been directed to the return by means of cracking a stopping door in conjunction with the use of a check curtain, or the use of a deflector, which is normal at the mine in question (Tr. 112-113). He also indicated that the chargers are normally ventilated by means of a deflector check (Tr. 116). He stated that the hazard created by failing to route the ventilating air current directly to the return, would result in eight people in the section possibly being affected by smoke or hydrogen. They could be asphyxiated in the event of a short circuit in the battery charger, and the mine moisture or humidity would contribute to the possibility of short circuiting (Tr. 119-120). He confirmed that he indicated on his "inspector's statement", exhibit G-9, that the likelihood of the battery charger sitting in the middle of the entry where the air was not being coursed to the return giving off hydrogen and causing it to be directed to the face to be "probable" (Tr. 123). He also indicated that the charger plugs that go to the scoops looked like they had recently been used (Tr. 124).

On cross-examination, Mr. Wehr confirmed that section 75.1105 requires an operator to vent the air current into the return when it passes over a battery charger station, and he confirmed that a battery charger is a moveable piece of equipment which may be moved during the course of a mining operation. While it is being moved, he stated that it was not possible to ventilate the air current into the return and the power cable would have to be disconnected when the unit is moved to a new location. Mr. Wehr stated that when he looked at the battery charger in question it did not appear to him that it was in the process of being moved, and he saw no physical sign of it being moved at that time (Tr. 128-129). He also indicated that when he asked the inspector escort Dunbar what the charger was doing in the middle of the entry, Mr. Dunbar replied that he did not know but would talk to the section foreman about it. Mr. Wehr also confirmed that his usual practice is to look for an "out of service" tag on the cable, but saw no such tag in this instance, and relied on Mr. Dunbar in determining whether the charger was being moved (Tr. 130). He also indicated that while he could have spoken with the section foreman or other crew members he did not do so and relied on Mr. Dunbar. He denied that Mr. Dunbar told him that the charger was in the process of being moved, and confirmed that Mr. Dunbar only told him that he would find out (Tr. 132).

Mr. Wehr confirmed that the citation was issued 9:30 a.m., and the miners on the section would have been there an hour or so before that time. He stated that if there were evidence that the battery charger was in the process of being moved up or dragged up, the violation would not have been issued (Tr. 133). He confirmed that the normal procedure in the mine is to locate the charger in the crosscut, but that in this case it was located approximately in the middle of the entry (Tr. 133). He assumed that the charger had been used on the immediate preceding shift, but he spoke with no one on that shift or to the section foreman and he explained his reason for not doing so by stating that he deals directly with the inspector escort for information unless he has to go to others for problems which may have occurred before, and he conceded that he was not prevented from speaking to the miners (Tr. 135). He conceded that he was not absolutely certain that the charger was used on the previous shift, and he based his conclusion that it was not being moved on the fact that he saw no physical evidence of any such move (Tr. 136).

Mr. Wehr stated that he has previously observed hydrogen being emitted during a battery charging process, stated the explosive range of hydrogen, and indicated that he was present in another mine when another MSHA inspector tested for explosive hydrogen. He conceded that before anyone could say that the presence of hydrogen is hazardous in such a situation, one must know the amount that is present. He did not observe any charging process in the instant case, and he conceded that he has no evidence to substantiate any conclusion as to any hydrogen emission hazard in this case or that an accident was "reasonably probable" or that it would "probably occur" (Tr. 142). He also indicated that the battery charger was provided with short circuit protection, but he did not know whether it was operational because "you would have to tear it apart" to determine this. However, even though the charger is not permissible, as far as he knew there was nothing wrong with the unit (Tr. 144). He also confirmed that the miners have preventive action available which they can take in the event of smoke, and these included use of their self-rescuer units and the intake escapeway, and he had no reason to believe that the miners would not have used these measures in the event of an accident (Tr. 145).

In response to bench questions, Mr. Wehr conceded that he made no detailed examination of the battery charger and took no smoke tube readings (Tr. 149-150). He also conceded that the operator was in compliance with the amount of air required to be on the section (Tr. 151). He assumed that the charger would be used to charge the battery scoop, and he could not recall what Mr. Dunbar told him when he came back after seeing the section foreman (Tr. 153). Mr. Wehr was not sure whether he was present when the condition was abated, and while his notes are silent on the abatement, he believed the citation was abated by moving the charger into the crosscut and putting a deflector on it (Tr. 154). He stated that the charger is on skids, and that the usual method for moving it is by use of the scoop bucket (Tr. 156).

Mathies Coal Company's Testimony and Evidence

Malcolm Dunbar, safety supervisor, Mathies Mine, testified that he accompanied the inspector during his inspection and he confirmed that the battery charger was located at the place indicated by Mr. Wehr. Mr. Dunbar testified that when Mr. Wehr asked for an explanation as to the location of the charger, he (Dunbar) told the inspector that he did not know but would ask the section foreman. The section foreman advised Mr. Dunbar that the charger was not being used because a new power station was under construction and that the charger would be relocated and would not be used until this was done. Mr. Dunbar stated that when he advised Mr. Wehr of this fact, Mr. Wehr told him that "the citation stands". He confirmed that Mr. Wehr told him that the battery charger plug was not deenergized and that it had the tag on it (Tr. 163-166).

Mr. Dunbar stated that even assuming that the charger were to be used without the air being vented into the return, he still did not believe that the citation was significant and substantial because the chargers are inspected weekly, and any defective ones are removed from service. He indicated that the charger in question was in good condition, and he also confirmed that in the event of an emergency, the men in the section could use their self-rescuers as well as the designated escapeqay (Tr. 166-168).

On cross-examination, Mr. Dunbar testified that battery charging stations have had no problems in the mine and stated that it was his understanding that the previous shift had begun the erection of a new charging station, and that this is the first step in the process of moving the station. He confirmed that the charger in question was not enclosed in a metal housing "station" when it was cited because it is a self-enclosed unit with no need for an additional enclosure. He confirmed that the metal housing could be begun without the necessity of moving the battery charger (Tr. 171). He admitted that the charger was moved to the new station immediately after the citation was issued (Tr. 176). The section foreman in question was not available for testimony because he has been laid off.

Findings and Conclusions

Fact of violation - Citation No. 1142336

The citation charges that the air current used to ventilate a battery charger which the inspector found in the middle of an entry

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was not coursed directly into the return. Mandatory safety standard 30 CFR 75.1105, states as follows:

> Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air current used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fireproof construction.

Mathies Coal Company's counsel argued that MSHA did not prove that the battery charger cited by Inspector Wehr had been used to charge any equipment during the time it was located in the middle of the entry (Tr. 172-173). Counsel also asserted that the evidence establishes that the battery charger was in the process of being moved at the time the inspector observed it, and that no violation has therefore been established (Tr. 173).

Upon consideration of all of the testimony and evidence adduced with regard to this citation, I conclude and find that MSHA has established a violation of section 75.1105 by a preponderance of the evidence. Mathies Coal has not rebutted the fact that at the time the inspector observed the charging unit in question it was located in the middle of the neutral intake entry, and the inspector's testimony establishes that the ventilation system in place at the time was such as to cause the air currents passing over the charging unit to be coursed back to the face area and not to the return as required.

With regard to the assertion by Mathies Coal that the charger was in the process of being moved, the fact is that at the time the unit was observed by the inspector the unit had not been moved to its newly located charging station. That was done after the citation was issued. The inspector's attention was called to the charger after he followed the course of a power cable which had been hooked into a belt transformer to the charger for a distance of some 300 feet and found it in the middle of the entry. Although the charger was not in operation charging any equipment at the time Mr. Wehr first observed it, the power cable was hooked up, it was not tagged out as was the usual practice, and the condition of the charger plugs which are normally hooked into the scoop while it is being charged led the inspector to believe that the charger had recently been used. In addition, the inspector observed no evidence that the unit was being moved, and it was not equipped with a deflector which is normally used to course the air into the return. Under all of these circumstances, the inspector's belief that the charger had recently been used was reasonable. Further, since the power cable was hooked up to a power source and was not tagged out, and since there were no other indications that the charging unit was actually moved at the time

Mr. Wehr observed it, the assertion by Mathies Coal that the unit "was in the process of being moved" is rejected. Although it may be true that the intent was to move the charging unit once the new charging station was completed, the fact is that the inspector saw no evidence of any such move, and his conclusions to the contrary are supported by the record evidence and testimony in this case. The citation IS AFFIRMED.

Significant and substantial

In addition to citing a violation of section 75.1105, the inspector also concluded that the violation was "significant and substantial", and he marked the appropriate block on the citation form accordingly. Mathies Coal challenges that finding.

In Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822, issued on April 7, 1981, the Commission interpreted section 104(d) and set forth the test for determining whether a condition created by a particular violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine hazard. The National Gypsum case was a civil penalty proceeding concerning eleven section 104(a) citations in which the inspectors marked the "S & S" block on the face of each citation. In that case the Commission held that a violation is "significant and substantial" if --

> based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

On the facts of this case, I cannot conclude that the conditions cited by Inspector Wehr constituted a significant and substantial violation of section 75.1105. Although Mr. Wehr alluded to certain general hazards connected with the failure to vent air coursed over a battery charger unit into the return, in the case at hand the evidence is clear that no such hazards existed. Mr. Wehr made no tests to detect the presence of any noxious gasses, he confirmed that the proper amount of air was present on the section, the power cable leading to the charger was hung on well insulated roof and rib insulators, no charging was taking place at the time he observed the unit, the unit was provided with short circuit protection, and Mr. Wehr detected nothing wrong with the unit itself. He also candidly conceded that before anyone can speculate as to whether or not the presence of hydrogen, which is sometimes given off when battery chargers are used, can cause an accident, there must be some indications as to the amounts given off, and he conceded that in this case there is no evidence that hazardous hydrogen was present or that an accident was reasonably probable.

Mine safety supervisor Dunbar testified that all battery chargers are inspected weekly and that any which are found defective are removed from service. He indicated that the unit in question was in good condition, and he confirmed that miners could use their self-rescuers and the designated escapeway in the event of any emergencies.

Given all of the prevailing circumstances, I conclude and find that MSHA has not established that the conditions at the time the citation issued were significant and substantial, and the inspector's finding in this regard IS VACATED.

Gravity

Although I have found that the battery charger violation was not significant and substantial, I nonetheless conclude and find that it was serious. While the prevailing conditions at the time of the citation may not have presented a significantly hazardous situation, leaving the battery charger in the middle of the entry hooked into a power source without the air deflectors presented a potential temptation for someone to engage the equipment and attempt to charge a scoop before the battery charger was actually placed into the completed charging station.

Fact of violation - Citation No. 1142337

This citation charges Mathies Coal with a failure to adequately guard the drive head on a conveyor belt. The cited mandatory safety standard, section 75.1722(a), provides as follows:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

At the conclusion of the inspector's testimony concerning the citation, Mathies Coal moved to dismiss his finding that the citation was "significant and substantial". In support of this motion, counsel asserted that Inspector Wehr only testified that an injury could be fatal, but did not testify that an injury was "reasonably likely to occur" as required by the decision in the National Gypsum case (Tr. 39). When asked whether his motion to dismiss also included an assertion that MSHA had filed to establish a prima facie case concerning the fact of violation, counsel stated in pertinent part as follows (Tr. 40):

> I am not going to argue that. Draw whatever inference you wish about that. I am arguing specifically S & S.

During further colloquy counsel conceded that the issues of "significant and substantial" and whether or not a violation of the cited mandatory standard has been proved are separate issues for which separate findings may be made, and counsel indicated that his motion to dismiss the "S & S" finding is based on a lack of evidence to support the inspector's conclusion in this regard (Tr. 42-44).

In further argument in support of his motion, Mathies' counsel stated that there is no testimony from the inspector as to whether how likely it would be for an injury to occur, but that if the question were put to him, he might testify that it is highly unlikely that an injury would occur under the factors that he did testify to (Tr. 48). When invited by the Court to put that question to the inspector during his cross-examination, counsel stated that he would not cross-examine the inspector (Tr. 48).

In response to the motion to dismiss the "S & S" finding, MSHA's counsel asserted that it is not necessary to elicit specific testimony from the inspector that the "reasonable likelihood of injury" test has been met. Counsel argued that the inspector made that finding when he issued the citation and marked the citation form "S & S". Further, counsel asserted that it is for the Judge to determine from the facts presented in this case whether or not the National Gypsum test has been met. Counsel asserted further that the inspector testified as to the frequency of employee exposure to the hazard, the likelihood of the injury, and the fact that he believed that the incline and wet floor increased the possibility of someone slipping or falling into the guard openings and making contact with the moving parts of the drive head. As for the "could be fatal" testimony by the inspector, MSHA's counsel stated that this has nothing to do with the "likelihood of an accident", but rather, goes to the seriousness of any injury. Given the facts of this case, counsel concludes that if an accident were to occur, it would be reasonably serious (Tr. 44-47). Concluding her arguments, counsel asserted as follows (Tr. 51):

> MISS GISMONDI: Apparently what Mr. Palmer is saying, because in spite of the fact that the witness testified to the underlying facts, because it did not come out of his mouth, the ultimate legal conclusion is that it is not sufficient. It is my position that it is the witness's role to testify to the facts and the Court's role to determine the legal conclusion of whether or not those facts support a finding of a reasonable likelihood of that of an accident occurring.

After due consideration of the argument presented by counsel, the motion to dismiss the "S & S" finding, as well as the citation, was denied from the bench (Tr. 55-56).

Mathies Coal declined to put on any evidence in defense of the inspector's assertion that the belt drive head was not adequately guarded. In support of the citation, MSHA's counsel asserted that the guard which was in place "allows pretty easy access to the moving parts of the drive head by virtue of the size of the openings, as well as the relatively flimsy construction of the posts and boards that were used as part of the guarding structure" (Tr. 83). In further support of the inspector's "S & S" findings, MSHA's counsel argued that two employees are in the general area in close proximity to the belt drive head on a daily basis, that the mine floor was wet and muddy, and that the belt was at the top of an incline, and that it was foreseeable that someone in the course of his normal job duties would make contact with the moving parts in question (Tr. 83).

In commenting on MSHA's position, Mathies Coal's counsel pointed out that Mr. Wehr's "inspector's statement" contains no information concerning the inclined roadway or wet conditions, and that MSHA's testimony does not elaborate on the fact that the drive head in question was protected by a guard provided by the manufacturer (Tr. 86-87).

It seems obvious to me from the facts of this case that at the time the citation was issued Mathies Coal was in the process of erecting wire mesh guarding for the cited piece of equipment. The conveyor belt had recently been installed and at the time the inspector was on the scene a framework of posts and wooden planks were in place and provided some means of protection for the belt drive head in question. Similar equipment at other locations in the mine were already guarded by practically identical systems of posts, wooden frames, and wires mesh. Therefore, the question presented is whether the posts and planks which were in place at the time the citation issued provided adequate guarding as required by section 75.1722(a).

Inspector Wehr testified that at the time the citation was issued the belt was in operation and the moving parts of the drive head in question were in motion. Although the drive head was partially protected by the existing guarding system framework, the inspector's concern was over the fact that the large openings in the framework provided ready access to the exposed moving parts of the belt head drive. Although Mr. Wehr conceded that a built-in guard was installed on the conveyor to protect the gear sprocket and drive head chain, he indicated that his principal concern was with the belt lacing and two drive rollers which he believed were totally unprotected. Although he conceded that one of the unguarded rollers was at a distance of four feet or more from the machine frame and existing guarding, and that it was unlikely that anyone would contact that point, he also indicated that at a second unguarded location the distance from the existing guarding to the unprotected roller was only two feet, and that if anyone happened to fall at that area they could easily reach the unguarded belt drive rollers and lacing.

I conclude and find that MSHA has established a violation of section 75.1722(a), by a preponderance of the evidence. Although the conditions cited are mitigated by the fact that an existing semblence of a guarding system was in place at the time the inspector viewed the conditions, the fact is that in at least one location where the distance from the unguarded pinch point to the existing guarding framework was two feet, the opening which was unguarded was sufficiently large enough to permit someone to fall in and reach the pinch point. While I reject MSHA's notion that the existing guarding framework was "flimsy", it seems clear to me that the wire meshing which is obviously nailed over the framework was not yet in place, and the existing openings were large enough to permit contact with the belt rollers. To that extent, MSHA has established a violation, and the citation is therefore AFFIRMED.

Significant and substantial

On the facts of this case, I conclude and find that MSHA has established that the conditions cited by the inspector constituted a significant and substantial violation of section 75.1722(a). MSHA established by credible evidence that the belt was in operation at the time the inspector viewed the conditions, and that at least two people were normally in the area during the course of any work shift. Although it is true that most of the belt drive location was guarded by posts and wooden planks, the actual wire mesh which the operator normally used to guard such belt drive locations had not as yet been installed at the time of the inspection, and at least one of the unguarded locations was two feet from the belt rollers and lacing. I conclude that this location was not adequately guarded to prevent anyone from coming into contact with the moving parts, and to that extent the violation is significant and substantial. Accordingly, the inspector's finding in this regard IS AFFIRMED.

Gravity

I conclude and find that the failure to completely guard the cited conveyor belt drive head constitutesd a serious violation, particularly at the one location where the pinch point was some two feet from the edge of the open guarding framework.

Negligence

I conclude and find that both citations which have been affirmed resulted from Mathies Coal Company's failure to take reasonable care to prevent the conditions cited by the inspector in these proceedings. With regard to the guarding citation, since the operator here went to the trouble of erecting a guarding system framework, it seems obvious to me that it was aware that the belt head drive location required guarding. As for the battery charger, I believe that a closer attention or examination to the area where the charger was found by the inspector would have alerted the operator to the existence of the cited conditions, thus enabling the operator to at least tag out the charger until such time as the asserted move was completed. I find that both citations resulted from ordinary negligence.

Good Faith Compliance

With regard to the guarding citation, the inspector testified that abatement was achieved within the time allowed, and that he considered this to be ordinary good faith abatament (Tr. 85-86).

With regard to the battery charger violation, the evidence establishes that the charger was moved into the charging station and that a deflector was installed on the unit to course the air into the return. It would appear that all of this was done in good faith and there is no evidence to the contrary. Accordingly, I conclude that good faith abatement was timely achieved by the operator in this case.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue Business

The parties stipulated that the payment of the proposed civil penalties will not adversely affect the company's ability to remain in business, and I adopt this as my finding on this issue. Further, the stipulated mine production of 73,000 tons for the period January 1, 1982 to May 21, 1982, leads me to conclude that the mine in question is a medium-to-large sized operation, and I take note of the fact that mine production apparently ceased on May 31, 1982.

History of Prior Violations

MSHA's Exhibit G-10, purports to be a computer print-out submitted by its counsel by letter dated September 21, 1982. The letter states that for the 24 month period preceding the issuance of the citations in issue in this case the Mathies Mine had 890 paid violations, 17 of which are for prior violations of section 75.1722(a), and 13 of which are for violations of section 1105.

At the time of hearing, MSHA's counsel did not have the computer print-out, and she was permitted to file it post-hearing. However, I note that the print-out submitted by counsel appears to be a partial listing, since the itemized citations contained on the three pages reflect a total of 141 violations, some of which are for violations subsequent to the dates of the citations in issue here. In addition, while the print-out contains a "certification" by someone from MSHA's Office of Assessments attesting to the authenticity of the print-out, the print-out itself contains no mine identification data to support the claim that it is in fact the data from the subject mine.

Since the information submitted by MSHA purporting to show the history of prior violations is confusing and incomprehensible, IT IS REJECTED. Insofar as this item is concerned, since I cannot understand it, I will not consider it.

Penalty Assessments

In view of the foregoing findings and conclusions, respondent is assessed civil penalties for the two violations which have been affirmed as follows:

Citation No.	Date	30 CFR Section	Assessment
1142336	9/22/81	75.1105	$300
1142337	0/22/81	75.1722(a)	225
			$525

ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this matter, in the amounts shown above, within thirty (30) days of the date of these decisions, and upon receipt of payment by MSHA these proceedings are dismissed.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

Jerry F. Palmer, Esq., Consolidation Coal Co., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

Janine C. Gismondi, Esq., U.S. Department of Labor, Office of the Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Harrison B. Combs, Esq., UMWA, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

DEC 21 1982

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 80-457-M
Petitioner : A.O. No. 35-02479-05002
:
v. : Tide Creek Pit
:
JOHN PETERSEN, d/b/a TIDE :
CREEK ROCK PRODUCTS, :
Respondent :

DECISION

Appearances: Faye Von Wrangel, Attorney, U.S. Department of Labor, Seattle, Washington, for the petitioner; Agnes Marie Petersen, Esquire, St. Helens, Oregon, for the respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment for six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened in Portland, Oregon, October 27, 1982. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter, as well as respondent's arguments set forth in its trial memorandum submitted at the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 30 C.F.R. § 2700.1 et seq.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties filed in this case, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Stipulations

The parties stipulated to the admissibility of exhibits C-1 and C-3 through C-6. Respondent objected to photographic exhibit C-2 is that it purports to show an acetylene bottle, whereas the citation cited oxygen bottles (Tr. 10-11). The parties also stipulated to the admissibility of respondent's exhibits R-1 through R-4 (Tr. 15), and that citation no. 349567 may be amended to reflect the correct standard.

Respondent's request for a visit to the mine site was brought to my attention for the first time on the day of the hearing. In view of my trial docket which called for me to travel to Medford, Oregon, on the afternoon of the conclusion of the hearing in this case respondent's counsel was advised that I would not be able to visit the mine site as requested since time would not permit (Tr. 114).

Discussion

The citations issued in this case are as follows:

Citation No. 349567, (as amended) May 8, 1980, 30 CFR 56.15-2:

> The owner, John Peterson and also the truck driver were not wearing hard hats around the plant area.

Citation No. 349568, May 8, 1980, 30 CFR 56.16-5:

> 3 Oxygen bottles were in the plant area and were not secured in any way. Two were lying on the ground, one was leaning against the frame work of a conveyor belt.

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Citation No. 349569, May 8, 1980, 30 CFR 56.14-3:

> The self cleaning tail pulley on the conveyor belt to the storage hopper was not completely guarded. The pulley was approximately 5 feet above ground level. Employees were occasionally in the area when the plant was operating.

Citation No. 349570, May 8, 1980, 30 CFR 56.15-4:

> The owner was breaking a rock in the jaw crusher with a sledge hammer without any eye protection to prevent injury to his eyes from flying rock particles.

Citation No. 349571, May 8, 1980, 30 CFR 56.14-3:

> The V-belt drive on the Rolls crusher was not completely guarded. The belt was approximately 5 feet above ground level.

Citation No. 349572, May 8, 1980, 30 CFR 56.14-3:

> The V-belt drive on the small Jaw crusher was not completely guarded. Employees were occasionally in the area while the plant was in operation.

Petitioner's testimony and evidence

MSHA Inspector Patrick Bodah testified as to his background and duties, and he confirmed that he conducted an inspection as the respondent's mine site on May 8, 1980. He indicated that he had inspected the site on several previous occasions, and that he knew the owner John Petersen. On May 8th he met Mr. Petersen at the mine and he accompanied him during his inspection rounds. Mr. Bodah described the mining operation as a rock crushing operation, and the "plant" comprised approximately 1/2 acre of ground, and he considered this to be a small operation. There were approximately three people in addition to Mr. Petersen working there when he inspected it, and he indicated that the entire operation could be viewed from one location (Tr. 16-20).

With regard to his citation for failure to wear hard hats, Mr. Bodah confirmed that he issued it because Mr. Petersen was not wearing a hard hat when he met him, and he did not have one on during the inspection rounds. In addition, a truck driver near the crusher loading hopper was not wearing a hard hat when he got out of his truck during the loading process. Mr. Petersen performed work breaking up a large rock and he was not wearing a hard hat. The truck driver was out of his truck and around the loading area without a hat on. Mr. Bodah believed that the hazards involved in not having a hard hat on were being struck on the head by falling objects or rocks or running into, or bumping into, low

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overhead beams. The plant belts and crushers were in operation and they were located above the truck driver's head, and he would be subjected to being struck by falling rocks. He indicated that occasionally, a large rock will pop out of a crusher. Mr. Petersen was in the crusher area and he would be subjected to the same hazards. Mr. Bodah discussed the matter with Mr. Petersen, and Mr. Petersen indicated that he instructed his employees to wear hard hats, but that he personally would not wear one (Tr. 20-24).

Mr. Bodah identified exhibit C-1 as a photograph of the unsecured oxygen bottles which he cited. He observed them to the left side of the jaw crusher area as he walked from his automobile, and while his recollection was not clear, he believed that one was lying on the ground and the other was leaning against something. He considered the unsecured bottles to be a hazard because "oxygen bottles are under high pressure; and if a truck should run over one or if something should fall on one and knock the neck out of it, it becomes sort of a missile. It can do a lot of damage." (Tr. 25). MSHA's counsel withdrew the photograph after conceding that the bottles depicted therein were in fact acetylene bottles (Tr. 28). However, the inspector clarified the matter by stating that the oxygen bottles were compressed gas and that the standard cited deals with compressed and liquid gas (Tr. 28).

Mr. Bodah identified exhibit C-3 as a photograph of the self cleaning tail pulley which he cited, and indicated that it was located on the rubberized conveyor belt to the storage hopper. He believed that the unguarded tail pulley was an area which would be accessible to anyone wandering around the plant, and that it would have been easily contacted by a person who could catch clothing or an arm in the unguarded area. He and Mr. Petersen were in the area during their inspection rounds. He drew a circle on the exhibit depicting the unguarded area, and he indicated that it was four and one-half-to-five feet off the ground (Tr. 31). He discussed the condition with Mr. Petersen, and Mr. Petersen cleaned the area out under the tail pulley and this made it inaccessible. That is, by cleaning out the area, the ground level was lowered to a distance of seven feet from the unguarded pulley, and it placed it at a point where it could not accidently be contacted (Tr. 31).

With regard to the safety glasses citation, Mr. Bodah confirmed that he issued that citation after he observed Mr. Petersen break a rock with a sledge hammer without using safety glasses. The rock would not go through the crusher, and that is why Mr. Petersen broke it up with the hammer. However, by doing so, he exposed himself to a hazard of being struck in the eye or head from flying chips of rock or steel from the hammer. He discussed that condition with Mr. Petersen, and glasses were provided for "whoever was breaking rocks" (Tr. 33-34).

Mr. Bodah identified exhibit C-4 as a photograph of the V-belt drive for the rolls crusher, placed an arrow where he believed a pinch point existed, and he indicated that the lack of a guard over the pinch point presented a hazard in that someone could get caught between the pulley and the belt. He and Mr. Petersen were in the area, and the unguarded area was approximately five feet above ground level. He discussed the matter with Mr. Petersen, and Mr. Petersen cleaned the area below the V-belt drive by removing rock which had spilled, and this made the drive inaccessible. After it was cleaned up, the area from the ground to the drive was seven or eight feet (Tr. 35-36).

Mr. Bodah identified exhibit C-5 as a photograph of the V-belt drive for the small jaw crusher, and he cited it because it was only partially guarded. The belt was located on an elevated work platform near where the plant operator works and he believed it was accessible to anybody in the area. The drive was about a foot and one-half above the platform level, and he believed that one could suffer severed or broken fingers if he came in contact with the partially guarded belt drive. He drew an arrow on the exhibit showing the partially guarded area which concerned him, and he indicated that access to the V-belt drive was from both sides. He discussed this citation with Mr. Petersen, and Mr. Petersen erected a barrier to prevent access to the unguarded belt (Tr. 38-39).

Respondent's counsel declined to cross-examine Inspector Bodah. However, in response to questions from the bench, he confirmed that he did not make any actual determination that the oxygen bottles which he cited were full or empty. Although he accepted Mr. Petersen's word that they were empty, Mr. Bodah stated "they're never empty. There's always pressure in one." (Tr. 40). The normal procedure for storing such bottles is to chain or fastened them in an upright position so they can not tip. The bottles are normally used for cutting and welding; and when they are used for this purpose they are at the work site, but Mr. Bodah could not state whether the area where he observed the bottles was a regular storage place (Tr. 42).

Regarding the unguarded self-cleaning tail pulley, exhibit C-3, Mr. Bodah confirmed that it was partly guarded by the sides of the conveyor frame. He also confirmed that the rock spillage had gradually built up under the machine to the point where the ground was elevated and placed the pulley area five feet from the top of the rock spillage pile. Had the spillage not been there, the pulley would not have been accessible to anyone walking on the spillage, and he would not have issued a citation. He believed that anyone walking along the spillage to clean up or to grease the equipment would likely pass through the area (Tr. 45).

Mr. Bodah stated that the crusher was not running when Mr. Petersen broke the large rock without wearing safety glasses. The rock would not go through the crusher, and the operator shut the machine down so that Mr. Petersen could break the rock up. Mr. Bodah could not recall whether Mr. Petersen had safety glasses on his person, but he did confirm that he did have them on when he broke up the rock (Tr. 47).

With respect to the hard hat citation, Mr. Bodah indicated that he issued the citation because Mr. Petersen would not wear a hat during the walk-around with him on the inspection. Hard hats were available at the site, but Mr. Petersen told him it was his policy that employees must wear them, but that he does not have to. Mr. Bodah stated that Mr. Petersen is at the plant site most of the time, and in response to a question as to what he would do if I were to go to the site for a "view" and was not furnished a hard hat while on the premises, he replied "if the plant were running and you did not have a hard hat on, I would cite Mr. Petersen for allowing you on the property without a hard hat" (Tr. 50). With regard to the truck driver, Mr. Bodah indicated that he is not required to wear a hat while in the truck because he has overhead protection, but that once he leaves the truck he has to wear his hard hat (Tr. 51). However, he stated that the driver has to operate the gate to let the material out of the hopper and into the truck (Tr. 51).

Mr. Bodah confirmed that while the standard states that hard hats should be worn to protect one from falling objects, he was equally concerned over the possibility that Mr. Petersen could strike his head while going under low areas, and his concern about being struck from objects was based on "danger from a rock flying from the pressure part of the operation through the air, and occasionally rather large rocks do become airborne" (Tr. 52).

With respect to the partially guarded rolls crusher, Mr. Bodah confirmed that the crusher is mounted on a trailer, and when not actually operating the equipment, the driver would probably be assigned clean-up chores and shovelling would be done while the equipment was still in operation. The most likely accident would occur if someone were to stumble near the pinch point and reach out and grab for the V-belt (Tr. 54). As for the small jaw crusher, exhibit C-5, while the operator would normally be stationed away from the machine while it was operating, he could walk right up to it from the adjacent walkway to grease or clean-up, and he believed the platform was provided to facilitate ready access to the equipment (Tr. 56). Had the spillage not been present, he would have considered the self-cleaning pulley and V-belt drive to be "guarded by location" since they would have been seven feet off the ground and out of the reach of anyone, and the citations would not have been issued (Tr. 56).

Respondent's testimony and evidence

John A. Petersen, the mine operator, identified exhibit R-1 as a photograph of the switch panel where one stands to operate the entire plant. He identified an overhead tin roof, and he indicated that when the plant is running there is no need for anyone to be around any of the conveyors or belts. The operator's control panel is elevated some seven feet off the ground, and the unguarded jaw crusher V-belt shown in exhibit C-5 is on the ground level below the operator and some 8 to 10 feet behind him. The only time anyone walks by the belt is to get to the elevated panel to turn the crusher on, and to come back down after it is turned off, and the area is some 60 feet from where the truck is located (Tr. 91-92). The self-cleaning tail pulley shown in exhibit C-3 is about 15 feet from the truck (Tr. 92).

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Mr. Petersen stated that the circle drawn by Inspector Bodah on the photographic exhibit C-3, reflecting the location of the self-cleaning tail pulley which he believed was unguarded is inaccurate. Mr. Petersen indicated that the area circled by the inspector is in fact the back end of the frame from which the conveyor is hung. Mr. Petersen indicated that the actual tail pulley in question is 12 inches in diameter and that it is located higher up on the photograph. The conveyor and pulley run up a very large hopper, and the truck and driver are positioned to the side of the hopper as shown in photographic exhibit R-2 (Tr. 92-94).

Mr. Petersen stated that the truck driver would be under the hopper conveyor belt, and while the largest stone on the belt would be a half-inch in diameter, the conveyor itself is "a trough", and that would be the only means of keeping rocks from falling off the conveyor. He did not believe that the driver could be struck by any rock because any spillage would occur at the back of the belt where the truck driver has no business being (Tr. 95-96). With regard to his hard hat, Mr. Petersen stated that when he is operating the "cat" he is protected by an overhead canopy, and the only time he would leave the "cat" would be to break the rocks if the crusher were broken down or plugged up (Tr. 96).

With regard to the rolls crusher shown in exhibit C-4, Mr. Petersen stated that water and mud is under the piece of equipment and someone would have a difficult time reaching the pulley area which was cited (Tr. 96). Mr. Petersen confirmed that he has had no on-the-job injuries since he has operated the business (Tr. 99). He also indicated that when he was breaking the rocks with a hammer, he was using a flat, double-ended "rock hammer" and not a sledge hammer, and in the 10 years he has used such a hammer to break rocks he has never suffered an eye injury from flying rock (Tr. 99). He considers himself to be skilled in the use of such a hammer, and he believed that the use of safety glasses would not have made his operation any safer "because if you beat on the rocks right, you don't get chunks in your face" (Tr. 100). When asked "how do you know that?", he replied "from using a sledge hammer and having them hit you in the legs and everywhere" (Tr. 100). He also indicated that company policy dictates that he is the only one who is to break rocks with the hammer, and none of his employees have ever had an on-the-job injury (Tr. 101).

Mr. Petersen testified further that he advised Inspector Bodah that the oxygen bottles which he cited were empty, but that Mr. Bodah indicated that it didn't make any difference whether they were empty or full (Tr. 102, 106), and that they had to be secured. Mr. Petersen conceded that the bottles would be hazardous if they were full, but he knew of no danger if they are empty. He also indicated that someone would have to "kick it pretty hard to tip it over" (Tr. 106).

Petitioner's arguments

Petitioner argued that it has established jurisdiction in this case, and that it is clear from the testimony of Mr. Petersen that his crushed rock product is used to build city, county, and State roads, all of which are instrumentalities of commerce. In addition, petitioner states that most of Mr. Petersen's equipment was produced outside of the State of Oregon, and that it is clear that at the time of the inspection, as well as in 1980, Mr. Petersen was operating a crushed stone operation employing himself, family members, and other employees. As for the fact of violations, petitioner asserted that the testimony and evidence adduced at the hearing establishes that the conditions and practices observed by the inspector at the time the citations were issued establishes each of the cited violations (Tr. 109-111).

Respondent's arguments

Respondent's counsel opted to rest on her arguments made in her Trial Memorandum filed at the hearing (Tr. 111). The memorandum is a part of the record in this case, and the arguments presented therein have been considered by me in the course of this decision.

In her trial memorandum, counsel asserts that "[u]nder Title 43, Section 4.1155, the burden of proof in civil penalty proceedings is upon OSM to go forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of a violation and as to the amount of any claimed penalty. Respondent believes that the burden is one of beyond a reasonable doubt since this is a quasi-criminal proceedings and what is sought is a fine" (pg. 6, Memorandum).

Respondent had previously argued that these proceedings were criminal in nature, and counsel had also requested attorney's fees. These arguments were rejected in my pretrial rulings made on August 20, 1981, and served on the parties. My reasons in this regard were stated in those rulings, which are a part of the record in this case, and they are reaffirmed. Respondent's request for attorney fees is denied, and her arguments concerning the "burden of proof" are likewise rejected.

As pointed out to counsel during the hearing, the references to "OSM" and the regulations issued thereunder are not applicable in these proceedings. The Office of Surface Mining (OSM) is an agency of the U.S. Department of the Interior, and not the U.S. Department of Labor which has enforcement jurisdiction under the Act in issue in these proceedings. MSHA's mandatory safety and health standards, and the applicable civil penalty procedures are found in Title 30, Code of Federal Regulations. Further, the applicable Commission Rules of Procedure are found in Title 29, Code of Federal Regulations, Part 2700, et seq., 44 Fed. Reg. 38226, June 29, 1979. A Judge's decision with respect to the asserted violations in cases of this type is determined by a preponderance of all of the reliable, credible, and probative testimony and evidence of record, and the Commission's standards for discretionary review of a Judge's decision are detailed at 29 CFR 2700.70.

Respondent's defenses to each of the citations are discussed and disposed of in my findings and conclusions concerning each of the cited violations.

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Findings and Conclusions

Jurisdiction

Respondent's initial answer to MSHA's proposals for assessment of civil penalties denied that the respondent's crushed stone operation was subject to the Act or to MSHA's enforcement jurisdiction. During the course of the hearing, respondent's position had not changed on this issue and counsel asserted that MSHA must establish that the operation is subject to the Act (Tr. 59).

MSHA's counsel confirmed that Mr. Petersen's operation had an MSHA "Mine ID" number, and she indicated that the production tons or man hours per year are shown as 6,000 (Tr. 62). Counsel confirmed that Mr. Petersen must have filed an MHSA "legal identity form" as required by the regulations since he has never been cited for failure to file such a form (Tr. 62).

Inspector Bodah testified that the crushed rock is trucked from the storage area at the mine to customers who may want to purchase it. He believed that the crushed rock is used for road base, concrete rock, fill, or for drainage rock. He confirmed that he does not inspect the site when its not in operation, could not recall how many previous times he inspected it, and indicated that in addition to Mr. Petersen and his son, three other employees were working at the site when he inspected it (Tr. 57).

Inspector Bodah disagreed with the respondent's assertion that his operation is not subject to the Act. He maintained that "we've been inspecting them for quite some time, and they're a producer of a product that enters into interstate commerce" (Tr. 59). He supported this conclusion by his observing the trucks hauling the crushed rock off the mine property, and this indicated to him "he's selling that rock to somebody" (Tr. 60). Mr. Bodah also indicated that the mine site is located in Columbia County, Tide Creek, Oregon, but he did not know whether the rock is actually shipped out of the state (Tr. 60). He believed that all crushing operations are considered under MSHA's jurisdiction.

John A. Petersen was called as a witness by the petitioner, and he confirmed that he is the president and owner of the controlling interest in Tide Creek Rock Products, Incorporated. The other stockholders are his wife and counsel Agnes Petersen, and his mother-in-law. He described the size of his rock product as ranging from a half-inch to three and a half-inches, and the raw materials are obtained from a hill located adjacent to the "plant". The hill is leased, but he owns all of the plant equipment and machinery. The actual worksite, including the hill, the storage stockpile, and the plant encompasses an area of an acre and one half (Tr. 65-68).

Mr. Petersen confirmed that at the time of the inspection in 1980, he and two of his sons were working at the plant. He would occasionally hire other people to help out, but he was operating the "Cat" and his son was driving a truck. Mr. Petersen could not estimate his annual dollar sales volume in 1980, and he indicated that in 1980 he operated "a third of the year" (Tr. 70). Since that time, the plant has been in operation less time, and he confirmed that the only product he produces is rocks of varying sizes. During 1980, he sold the rock primarily to St. Helens Paving, and the product was used to pave streets and highways, including county, city, and state highways, and driveways (Tr. 71). Other customers would "come and go, different ones at different times", but he could not recall the names of any of them. His primary employment at that time was with his company (Tr. 72).

With regard to his equipment, Mr. Petersen stated that the truck used to haul his product was manufactured by "Peterbuilt Truck", and while he did not know where it was manufactured, he believed it was the State of Washington. The "Cat" or Caterpillar was produced in Illinois, and the jaw crusher was manufactured in Cedar Rapids, Iowa (Tr. 87-89).

On the basis of the foregoing testimony and evidence adduced here, it seems clear to me that respondent's strip mining operation is subject to the Act, as well as to MSHA's enforcement jurisdiction. Respondent's sales of rock products, as well as the use of equipment manufactured out of State, certainly affects commerce within the meaning of the jurisdictional language of the Act. Accordingly, its arguments to the contrary are rejected.

Failure to secure compressed and liquid gas cylinders - Citation 349568

30 CFR 56.16-5, provides as follows:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

Respondent takes the position that the cited compressed gas cylinders were empty and that the petitioner offered no credible proof that they were full or unsafe at the location where they were found.

Section 56.16-5 requires that compressed and liquid gas cylinders be secured in a safe manner. Petitioner has established that the cylinders in question were not secured, and that one was standing upright and the other was lying on the ground. Respondent does not dispute this fact, and takes the additional position that there is no "safety advantage to hanging up an empty oxygen bottle". The standard cited makes no distinction between full or empty cylinders, and respondent's defense on this ground is rejected. Respondent's arguments go more to the seriousness or gravity of the violation, rather than to an absolute defense to the cited standard. Accordingly, this citation IS AFFIRMED.

Gravity

The inspector failed to determine whether the cited cylinders were full or empty. I accept Mr. Petersen's testimony that they were in

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fact empty. Mr. Petersen conceded that the bottles were simply placed outside the shop area some 15 feet away while awaiting to be taken to town to be refilled, and while he also conceded that employees walked by the area, I cannot conclude or find that the bottles posed any real hazard. The bottles which were filled and in use in the shop were apparently secured since Mr. Petersen indicated that they were in fact chained up when in use. I conclude and find that this citation was nonserious.

Failure to Wear suitable hard hats - Citation 349567

30 CFR 56.15-2, provides as follows:

> All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

As I observed during the course of the hearing, the language of the "hard hat" standard does not state "All persons whall wear suitable hard hats when in or around a mine or plant". A condition precedent to the requirement that a hard hat be worn is a finding that falling objects may creata a hazard. Respondent argues that the language of the standard is not intended to guard against one bumping his head against a low beam or piece of equipment. Insofar as any "falling objects" are concerned, counsel argues that when the inspector arrived at the scene, Mr. Petersen has just finished doing some work in the caterpillar pushing rocks from the hill into the chute below it, and while engaged in this activity he was fully protected by the machine overhead canopy. This being the case, counsel argued that there was no possibility or likelihood of his being struck by a falling object. Counsel advanced this same argument in defense of the failure by the truck driver to have his hard hat on, and also made the additional argument that no rocks ever fall out of the overhead conveyor where the truck was located.

Inspector Bodah indicated that when he came on the property Mr. Petersen was not wearing a hard hat, that he refused to wear one during the entire inspection, and was not wearing one when he broke up the rock which had jammed in the crusher. As for the truck driver, Mr. Bodah indicated that the truck driver was out of his truck, was around the hopper loading area, and that his job was to open the hopper chute to allow the rock materials to load onto the truck. He also indicated that rocks have on occasion been propelled from the crusher, or they could fall out of the overhead conveyor belt leading up into the hopper.

While it may be true that one is not expected or required to wear a hard hat while inside a vehicle which has an overhead cab or canopy, the truck driver was not in his vehicle at the time the inspector observed him at or near the overhead conveyor belt. Since the driver's duties include activating the chute which opens the hopper and loads the truck, I believe there is a strong possibility that the driver could be struck by overhead rocks falling out of the chute, off the truck, or being

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propelled out of the hopper itself. Respondent's assertions that events like this never occur are rejected, and I conclude that the failure by the truck driver to have his hard hat on constituted a violation of the cited standard and IT IS AFFIRMED.

With regard to Mr. Petersen's failure to wear a hard hat, even though he may have been protected while in the cab of the cat, his routine practice and refusal to wear a hard hat at all times while working around the plant also constitutes a violation of the hard hat requirement. Respondent has not established that there are never any falling objects such as rocks or other materials or equipment at the plant, and the petitioner's evidence establishes that there is a potential for the rocks to fall from overhead conveyors. While one may agree that the language of the standard is inartfully drawn, on the facts here presented Mr. Petersen's refusal to ever wear a hard hat while the plant is in operation constituted a violation of section 56.15-2. Although the inspector could have cited two separate citations for Mr. Petersen and the truck driver, he opted to incorporate both incidents into one citation, and I see nothing improper with this procedure.

Gravity

I conclude that the failure by Mr. Petersen and the truck driver in question to wear their hard hats while in and about the plant area while the equipment was in operation was serious. The truck driver is close to the overhead conveyor when he activates the lever or mechanism forcing the coal into the hopper, and it is possible for him to be struck by rocks falling out of the conveyor. As for Mr. Petersen, while it may be true that he was protected while under the cab of the equipment he was operating, there is no assurance that he is always protected while walking and working around the plant.

Failure to wear protective safety glasses - Citation 349570

30 CFR 56.15-4, provides as follows:

> All persons shall wear safety glasses, goggles or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Respondent's defense to the safety glasses citation rests on its assertion that Mr. Petersen has worked for 30 years in dangerous occupations, 10 years of which have been spent breaking up rocks with an appropriate rock hammer that is specifically designed to prevent splintering, and in all of this time he has never suffered any eye or other injuries. Further, counsel pointed to the fact that Mr. Petersen never allows other employees to break rocks, and that the likelihood that safety glasses would have improved safety is very remote. Counsel also asserted that the law clearly requires more for the meaning of the word "could" as used in the standard.

There is no question but that Mr. Petersen was not wearing any eye protection at the time Inspector Bodah observed him breaking up the rock which had jammed in the crusher. In my view, the fact that Mr. Petersen is experienced at breaking rocks, used the proper tool for that purpose, and instructed his employees that he was the only one to break rocks, does not establish an absolute defense to the citation, and counsel's interpretation as to the application of the use of the word "could" is rejected. While Mr. Petersen's safety record is commendable, I for one would not like to see his luck run out. In my view, there is always a chance that the most experienced miner in the world will be injured by his failure to completely protect himself. Here, Mr. Petersen admitted that when he used a sledge hammer in the past, flying rocks often struck him in the legs. I realize he said that to justify his use of a flat rock hammer, but one mis-strike of that hammer, just as one slip of a scapel in the hands of a skilled surgeon, could prove disastrous. This citation IS AFFIRMED.

Gravity

Although the use of a flat-headed rock hammer in the hands of a skilled and experienced miner may mitigate the seriousness of any hazard, on the facts of this case, I conclude that the citation was serious. At the time of the citation, Mr. Petersen had in his employ two of his young sons who helped out at the plant, and Mr. Petersen was not always present when work had to be performed, and I am sure he is not present every time the crusher jammed. In these circumstances, even though he ordered no one else to break up rock, I believe that it was reasonable to assume that someone could follow his example and attempt to break up a jammed rock in his absence, thereby exposing themselves to a possible eye injury. Mr. Petersen's practice and routine breaking up of rocks without wearing safety glasses is just as serious as the actual act which the inspector observed at the time the citation issued.

Failure to completely guard the storage hopper self-cleaning conveyor belt tail pulley - Citation 349569; the rolls crusher V-belt drive - Citation 349571; and the jaw crusher V-belt drive - Citation 349572.

30 CFR 56.14-3, provides as follows:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught bewteen the belt and the pulley.

Respondent's defense to the self-cleaning conveyor belt citation is that since it is 5 or 6 feet from the ground and no one is around it when it is running, there is no way anyone can accidently reach behind the guard and become caught between the belt and the pulley. Respondent points out that when the conveyor is running the closest person to it

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is 10 to 15 feet away, that the placement of the belt is too high for any one to "accidentally reach behind it", and any injury at the cited location would have to be done deliberately and intentionally.

With regard to the crusher V-belt drive citation, respondent maintains that the equipment is so high above the ground level and surrounded by a "thigh deep moat and about 2 or 3 feet of mud and water", that a fool would have to wade out and jump or reach very high to even get to the location in question. Respondent concludes that there is no way anyone could accidentally get injured at the cited location.

Respondent's defense to the jaw crusher V-belt citation is that the piece of equipment is covered up, that the chain which the inspector recommended be put up was meaningless, and that when the crusher is running no employees are there.

Mr. Bodah believed that the guarding standard he cited requires that partially guarded converyor pulleys be inaccessible, and since the accumulated rock made them accessible, the standard was violated (Tr. 44). In my view, the standard requires that guards be extended a sufficient distance to prevent a person from accidentally reaching behind the guard and getting caught between the belt and the pulley. It seems clear to me that any consideration of the standard must take into account the question of whether the existing guarding is sufficient.

On the facts of this case, the determining factor in the mind of the inspector as to whether the standard was violated is not whether any existing guard was sufficient, but rather, whether or not the terrain beneath the pulley was elevated enough to cause one to accidentally reach into the pulley and injure himself. In short, the elevation of the spillage in direct relationship to the overhead height of the pulley is the determining factor, and this may change from day to day. What is a safe distance on one day may not be the next. What is "guarding by location" in one inspector's mind, may not be sufficient for another inspector. In short, the regulatory language leads to some highly subjective judgment calls by an inspector.

It seems to me that if MSHA's intent in promulgating the standard is to prevent and preclude accidents in connection with unguarded or partially guarded pulley pinch-points, then it should seriously consider amending its standards to require all such areas to be guarded without qualification or any conditions precedent. The use of open-ended and broad language such as that found in section 56.14-1 through 56.14-3, i.e., "may be contacted", "sufficient distance", "accidentally reaching", results in some rather strained interpretations, and I sympathize with inspector's who have to grapple with the guarding standards, and with the solicitor's who have to defend the numerous guarding citations issued under these sections.

Inspector Bodah conceded that the self-cleaning belt tail pulley and rolls crusher V-belt drive pulley would normally be guarded by location since they were approximately seven feet above ground level and out of the reach of anyone. The basis for the citations was his concern that rock spillage in and around the area beneath the pulley locations raised the level of the ground to a point which would bring anyone walking on the spillage directly under the pulleys into close proximity or reach of the pinch points which were partially guarded. Mr. Bodah indicated that someone would normally walk across the "flattened out" spillage since the area "was the means of access to get inside the plant area" (Tr. 45). The gradual spillage elevated the area to a point at approximately four and a half to five feet below the overhead pulleys, and Mr. Bodah was concerned that someone walking through the area to grease the equipment or to clean up could stumble, and if he did, he would somehow instinctively reach out for something, and he knows of instances where someone reached out for a V-belt (Tr. 54).

In this case, the respondent has established to my satisfaction that when the equipment is running each employee is assigned to a specific location to keep the "plant" moving. The "plant" includes a hopper, a crusher, a truck, a stockpile, and a hill from where the raw rocks are taken. I simply can find no support for the proposition that when everything is moving, someone will leave their assigned work station, walk over a two or three foot mound of rocks under an overhead pulley and attempt to grease that machine. Neither can I believe that in this same scenario, someone will take a shovel and start shovelling rocks while he is supposed to be at his normal duty station. In the instant case, since the rock spillage obviously accumulated over a long period of time, no one had been in the area cleaning up. Further, one of the elevated pulleys is self-cleaning, and there is no indication that anyone had to go into that equipment to clean it. In addition, Mr. Bodah candidly conceded that if there are any equipment problems the plant is shut down (Tr. 47).

I accept Mr. Petersen's testimony that the actual location of the storage hopper self-cleaning tail pulley was at a point higher on photographic exhibit C-3, than that stated by Mr. Bodah. The area circled by Mr. Bodah is the frame from which the conveyor hangs, and the actual pulley area in question is higher up and behind the tail pulley shaft as shown in the photograph. Having viewed the photograph and after careful consideration of all of the testimony in this case, I cannot conclude that the alleged insufficiently guarded tail pulley in question was located in such a position where anyone could accidentally reach in and become entangled in the pulley. Of course, if someone deliberately jumped up and reached into the area, or placed a ladder against the conveyor frame and climbed up and stuck their hand in the pulley, they would undoubtedly be injured. If that is the type of situation MSHA is attempting to guard against, then they should say so in clear and precise regulatory language. Citation No. 349569 IS VACATED.

Although Mr. Bodah indicated that the jaw crusher operator could walk up to the V-belt for greasing and clean-up, the fact is he really did not know that this was the case (Tr. 55). Mr. Bodah's testimony that employees grease and clean-up around unguarded tail pulleys and pinch-points must be taken in context. He suspected and speculated that an employee would grease and clean-up around the V-belt because he observed a platform around the equipment. Since he believed the platform was there for a specific purpose, he concluded that it was obviously used to provide ready access to the equipment, and this is a logical assumption on his part. However, absent any credible evidence that the equipment is in fact greased and cleaned while it is running, and absent any evidence that any employee is required to be in close proximity to the moving parts of the crusher as a routine normal part of his job, or that miners regularly pass by the area, there is no support for me to make any of these inferences. As a matter of fact, abatement of this citation was not achieved by placing a guard over the asserted pinch-point. Mr. Petersen installed a chain or fence across the area away from the pinch point.

Mr. Petersen's testimony is that the only time anyone goes to the crusher platform area is when the equipment breaks down or plugs up, or while going up and down while shutting the equipment down or turning it on. The equipment is shut down when it is plugged up or broken down. In addition, the crusher operator is at some distance from the actual pinch point when he is running the crusher, and he is the only person there. Further, Mr. Petersen's description of the area where the asserted pinch-point was located, including the photographic exhibits, leads me to conclude that one would have to make a deliberate and conscious effort to first reach the area, and then deliberately reach in and contact the partially guarded pinch point. Given these circumstances, I conclude and find that the existing partial guarding was adequate enough to prevent an accident, and that the petitioner has not established that the location of the jaw crusher V-belt drive was such that a person could accidentally reach in and get caught in the drive pulley. Accordingly, Citation No. 349572 IS VACATED.

With regard to the rolls crusher V-belt, Mr. Bodah first stated that the entire V-belt drive was unguarded, but that the pinch point which concerned him most was where he drew in the arrow in the photographic exhibit C-4 (Tr. 34). However, his citation reflects that the drive "was not completely guarded", and his later testimony is that the pulley area was partially guarded by frame on the backside of the machine (Tr. 52). At first Mr. Bodah indicated that the truck driver may be assigned clean-up duties when he is not driving his truck, and that "usually they put them cleaning here or doing some little repair work or whatever" (Tr. 43). However, he later indicated that "I don't know what Mr. Petersen's procedure is which the truck driver" (Tr. 52). It seems to me that the best evidence as to what the driver does when he is not driving, is to speak with him. Mr. Bodah apparently did not do so. Therefore, absent any credible evidence that the driver is near the pulley in question performing clean-up duties while the rolls crusher is in operation, I cannot conclude that the unguarded area which concerned the inspector, as shown on photographic exhibit C-4, was an area which posed a hazard in this case.

Respondent's arguments that the rolls crusher was surrounded by "a moat of water" is an exaggeration. The testimony by Mr. Petersen is that one would have to "wade in water and mud up to your knee or walk on a little berm of rock two or three feet high" to become tangled up in the area which concerned Mr. Bodah. Mr. Petersen concluded that one "would be a damn fool" to go into that area (Tr. 84).

On the basis of all of the facts and evidence adduced in this case, I cannot conclude that the pinch point at the rear of the pulley shown on exhibit C-4, constituted an area where someone could accidentally reach in and become entangled. The facts show that no one is stationed in that area, has no reason to be there, and the frame, wheels, and general machine confirugation, provide adequate protection. Citation No. 349571 IS VACATED.

Size of business and the effect of any civil penalties on the respondent's ability to remain business.

Although the respondent is obviously not too enchanted over the prospect of paying civil penalties for conditions and practices which he abated, no evidence was forthcoming that the assessment and payment of reasonable civil penalties for the citations which have been affirmed will adversely affect his ability to continue in business. Accordingly, I conclude and find that they will not.

The record in this case establishes that the respondent's rock crushing operation is a very small family-owned operation, operating more or less with three or four workers, and I have considered this in the civil penalty assessments made by me for the citations.

History of prior violations

MSHA's computer print-out, exhibit C-6, reflects that for the period May 8, 1978, to May 7, 1980, the mine had one assessed violation (Tr. 58).

Good faith comliance

Petitioner conceced that the respondent corrected all of the cited conditions and acted in good faith in achieving compliance within the time periods fixed by the inspector (Tr. 105), and I so find.

Negligence

I find that all of the citations which have been affirmed in this case resulted from the respondent's failure to exercise reasonable care to prevent the conditions or practices which resulted in the issuance of the citations. As the mine owner and operator, Mr. Petersen had an obligation to be aware of the requirements of the standards cited, and to prevent the conditions and practices cited. His failure to so constitutes ordinary negligence as to each citation.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
349567	5/8/80	56.15-2	$ 50
349568	5/8/80	56.16-5	20
349570	5/8/80	56.15-4	[illegible]
			$ 145

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Faye von Wrangel, Esq., U.S. Department of Labor, Office of the Solicitor, 8003 F.O.B., Seattle, WA 9817. (Certified Mail)

Agnes Marie Petersen, Esq., Gray Bldg., 222 S. First St., St. Helens, OR 79051 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
v.	DOCKET NO. CENT 81-129-M DOCKET NO. CENT 81-241-M
AMAX CHEMICAL CORPORATION, Respondent,	MINE: Amax Mine & Mill
UNITED STEELWORKERS OF AMERICA, AUTHORIZED EMPLOYEE REPRESENTATIVE, Intervenor.	

FINAL ORDER

CENT 81-129-M

On November 1, 1979 the Secretary issued Citation 161852 against respondent AMAX Chemical Corporation. The citation, alleging a violation of 30 C.F.R. 57.5-5, provides as follows:

> Condition or practice the Marretta Miner operator in the 110 mining section was exposed to a Time Weighted Average (TWA) of 26.11 Mg/M^3 of total particulate nuisance dust in a dust survey taken on the 11-01-79 for a 8 hour survey. The Threshold Limit Value (TLV) was 10 Mg/M^3. Feasible engineering controls were not being utilized to reduce this dust concentration, to eliminate the need to wear respirators. This citation was written on the 01-21-80 after dust results were received from the analysis center in Denver, Colorado.

Several extensions of the citation were issued and the citation was terminated on September 30, 1980.

On December 12, 1980 petitioner filed his proposed penalty assessment and on February 4, 1981 Amax filed its notice of contest. Subsequently the Secretary filed his complaint before the Commission.

CENT 81-241-M

On February 27, 1979 the Secretary issued Citation 161808 against respondent Amax Chemical Corporation. The citation, alleging a violation of 30 C.F.R. 57.5-5 provides, as follows:

> Condition or practice the slusher operator working in the warehouse area was exposed to a time weighted average (TWA) of 39.9 Mg/M^3 of total particulate bearing nuisance dust, where as the Threshold Limit Value (TLV) is 10 Mg/M^3. Feasible engineering or/and administrative controls were not being utilized to reduce this amount to acceptable standards and eliminate the need to wear respirators. This citation was written on the 04-11-79 at 0935 hours. The dust analysis results were received on this date.

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Several extensions of the citation were issued and on April 14, 1981 the citation was terminated.

On June 18, 1981 the Secretary filed his proposed penalty assessment and on June 30, 1981 Amax filed its notice of contest. The Secretary subsequently filed his complaint before the Commission.

Pursuant to Commission rule 29 C.F.R. 2700.12 the above cases were consolidated.

The standard allegedly violated, 30 C.F.R. 57.5-5 provides as follows:

> § 57.5 Air quality, ventilation, radiation, and physical agents.
>
> 57.5-5 Mandatory. Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentration of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements:
>
> (a) Mine Safety and Health Administration approved respirators which are applicable and suitable for the purpose intended shall be furnished, and employees shall use the protective equipment in accordance with training and instruction.
>
> (b) A respirator program consistent with the requirement of ANSI Z88.2-1969, published by the American National Standards Institute and entitled "American National Standards Practices for Respiratory Protection ANSI Z88.2-1969, approved August 11, 1969, which is hereby incorporated by reference and made a part hereof. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.
>
> (c) When respiratory protection is used in atmospheres immediately harmful to life, the presence of at least one other person with backup equipment and rescue capability shall be required in the event of failure of the respiratory equipment.

On July 29, 1982 the United Steelworkers of America, (Steelworkers), representatives of the miners at the Amax facility, sought to intervene as a party.

On August 9, 1982 the Secretary moved to withdraw his complaints. In support of his motion the Secretary stated that his citations were previously vacated in accordance with MSHA policy memorandum No. 82-12MM issued July 9, 1982.

On September 15, 1982, pursuant to Commission Rule 29 C.F.R. § 2700.4, the Steelworkers were permitted to intervene. The parties were further invited to brief the issue of whether the Commission should grant the Secretary's motion to withdraw his complaints.

The Steelworkers object on the grounds that the Act requires the Commission's approval for withdrawal of the citation (30 U.S.C. 820(k)); further, the Steelworkers argue that the policy relied on by the Secretary is not a proper reason for dismissing these cases. Finally, the Steelworkers argue that the Secretary's enforcement policy is inconsistent with the Act.

The Act expressly accords a miner several rights the exercise of which will not subject him to discharge or discrimination. However, there is nothing in the Act authorizing affected miners or their representatives the right to prosecute a contested citation if the Secretary elects not to do so. *Cf Secretary v. Kocher Coal Company* Penn 80-174-R, (December 8, 1982); *Marshall v. Occupational Safety & Health Review Commission et al* 635 F 2d 544; *Oil, Chemical and Atomic Workers International Union v. Occupational Safety & Health Review Commission* 671 F. 2d 643 (1982). *cert denied*.

Accordingly, pursuant to Commission Rule 29 C.F.R. § 2700.11, I enter the following:

ORDER

1. The motion of the Secretary to dismiss his complaints is granted.
2. The cases are dismissed.
3. The objections of the United Steelworkers of America are denied.

John J. Morris

John J. Morris
Administrative Law Judge

Distribution:

Edward Fitch, Esq.
Office of the Solicitor
United States Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

Charles C. High, Jr., Esq.
Kemp, Smith, White, Duncan & Hammond
P.O. Drawer 2800
El Paso, Texas 79952

Mary Win-O'Brien, Esq.
United Steelworkers of America
Five Gateway Center
Pittsburgh, Pennsylvania 15222

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 29 1982

PRINCESS SUSAN COAL COMPANY, : CONTEST OF CITATION
Contestant :
v. : Docket No. WEVA 79-423-R
:
SECRETARY OF LABOR, : Citation No. 0641203;
MINE SAFETY AND HEALTH : 9/4/79
ADMINISTRATION (MSHA), :
Respondent : Campbells Creek Surface
: Mine

ORDER OF DISMISSAL

Contestant requests approval to withdraw its Contest in the captioned case. Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The case is therefore dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail.

Leo McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

C. Lynch Christian, Esq., Princess Susan Coal Company, Jackson, Kelly, Holt & O'Farrell, P.O. Box 553, Charleston, WV 25322

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